(3)

91-2062

Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the
United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

Appendix in Support of Petition
for Writ of Certiorari

to the

United States Court of Appeals
for the Sixth Circuit

Volume I

Lynn H. Shecter
Counsel of Record
for Petitioner
Roy, Shecter Vocht, P.C.
877 South Adams, Suite 302
Birmingham, MI. 48009
(313) 540-7660

APPENDIX

Decision of the United States District Court for the Eastern District of Michigan.....1

Decision of the Merit Systems Protection Board, Chicago Regional Office.....12

Decision of the United States Court of Appeals for the Sixth Circuit.....36

Deposition of Sharon Hays.....40

Decision of the United States Court of Appeals for the Federal Circuit.....113

Decision of the Merit Systems Protection Board.....125

Plaintiff's Motion for Summary Judgment on the Issue of Liability.....157

Plaintiff's Answer to Defendant's Supplemental Motion for Summary Judgment.....204

Merit Placement Announcement.....246

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

v.

Civil Action No.
89-CV-71021-DT

SECRETARY OF UNITED STATES
DEPART OF TREASURY;
INTERNAL REVENUE SERVICE,

Defendants.
_____/

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Monday, December 17, 1990.
APPEARANCES:

ROY, SHECTER & VOCHT, P.C.
Suite 302
877 S. Adams
Birmingham, Michigan 48009
(By William A. Roy, Esq.)

Appearing on behalf of Plaintiff Charles E. Gavette

APPEARANCES (Continued):

FRANCIS L. ZEBOT, Esq.
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226

and

JOHN A. FREEMAN, Esq.
Assistant IRS District Counsel
Internal Revenue Service
Cincinnati, Ohio 45202

of counsel

Appearing on behalf of Defendants Secretary of United States Department of Treasury and Internal Revenue Service

Detroit, Michigan
Monday, December 17, 1990

- - -

THE CLERK OF THE COURT: Docket No. 89-71021, Gavette v Internal Revenue Service.

MR. ROY: Your Honor, William A. Roy, Roy, Shecter Vocht, on behalf of Charles E. Gavette.

MR. ZEBOT: Frank Zebot on behalf of the Secretary and with me is John Freeman, Assistant District Counsel.

THE COURT: Gentlemen, as I understand this, all of the claims that Mr. Gavette makes in this case were presented to the Merit System Protection Board is that a fair statement, at one time or another in an administration proceeding?

MR ROY: Your Honor, I don't

believe that the claims that he made with respect to the dates from 1979 to 1982 were in there.

THE COURT: Mr. Zebot says that initially those claims were made to the Hearing Officer and abandoned when an appeal was taken from the Hearing Officer to the Merit System Protection Board, do you not, Mr. Zebot?

MR. ZEBOT: Yes, your Honor.

THE COURT: If that's the case, and the Merit System Protection Board ordered relief, and the Internal Revenue Service said we complied with the order, the argument really is over whether or not there was compliance, is that a fair statement?

MR. ROY: Yes, your Honor.

MR. ZEBOT: Yes, your Honor.

THE COURT: It seems to me that whether or not there was compliance, there is a procedure established by law for allowing for the Merit System Protection Board to determine whether or not there was compliance and nobody has taken that, and, as I read the regulations, you must do it within 30 days, if you do it longer then ,30 days you have to she good cause for the delay, is that a fair statement?

MR. ZEBOT: I believe it is, your Honor, from our point of view.

MR. ROY: I don't know whether that's a fair -- I know that's a fact. But there's a procedure for that and we're saying we were already there.

THE COURT: If you both sit down, I have a short memo I'm going to read into the record.

MR. ZEBOT: Thank you, your Honor.

THE COURT: These are the Court's findings on the cross motions for summary judgment.

1. Plaintiff was disabled from 1971 to 1982 and January, 1985-1986.

2. Plaintiff claims he was disadvantaged during these periods because he was a) not notified of promotional rights and b) not considered for promotion. Plaintiff says that these failures constitute handicap discrimination and age discrimination in violation of 5 U.S.C. 8151.

3. Pursuant to 5 C.F.R. 353.401,

Plaintiff appealed to the Merit System Protection Board. See 5 U.S.C. 7701(a).

4. Appeals from decision of the Merit System Protection Board are to be taken to the District Court when discrimination is claimed. 5 U.S.C. 7703(b)(2).

5. If the Merit System Protection Board. does not act within 30 days, an action may be filed in the District Court. 5 U.S.C. 7702(e)(1)(B). This apparently does not divest the Merit System Protection Board of jurisdiction. McGovern v E.E.O.C., 28 M.S.P. 3689.

6. The Court waited -- Plaintiff instituted a suit in this Court prior to

a decision by the Merit System Protection Board. The Court has waited for the decision of the Merit System Protection Board before acting on Defendants' Motion for Summary Judgment.

7. On March 8, 1990 the Merit System Protection Board decided the case. It considered a) failure of the IRS to inform Plaintiff of his 5 restoration rights, b) the IRS improperly failed to restore Plaintiff to duty by not promoting Plaintiff to a GS-13 "CEP Team Coordinator" position, and discriminated against Plaintiff on the basis of age and handicap. The decision of the Merit System Protection Board describes generally the background of the relationship between Plaintiff

and the IRS.

8. In the process of taking his case to the Merit System Protection Board, Plaintiff abandoned claims of mistreatment for 1979-1982.

9. The Merit System Protection Board's decision required the IRS to a) consider Plaintiff nationwide for restoration positions at the GS-13 grade level or higher, for which he would have been considered had he been present from January 25, 1985 (the date of his disability) to the date he was permitted by the IRS to return to work, b) the IRS was required to identify positions on a nationwide basis retroactive from January 25, 1985 to the date Plaintiff returned to work, and c) the IRS was to

determine
whether Plaintiff was qualified for these positions based on his recovery from his emotional illness.

10. On March 28, 1990 the IRS notified Plaintiff it would comply with the Merit System Protection Board decision, but since it appeared Plaintiff never submitted an Application for Promotion/Reassignment Form 4536 during the applicable period, a requirement of the IRS's merit promotion plan, it was unlikely Plaintiff could be considered for promotion.

11. On May 7, 1990 the IRS notified Plaintiff he was not eligible for promotion since he did not fill out and file the Form 4536 during the period

January 25, 1985 through July 5, 1988. The IRS said it had complied with the Merit System Protection Board Order of March 6, 1990 by such action.

12. Plaintiff does not contest the IRS position administratively. He had 30 days after service of the notice of full compliance (May 7, 1990) to petition for enforcement. 5 C.F.R. 1201.82. It appears also under the applicable provisions of the Code of Federal Regulations that the 30 day period may be extended by the Merit System Protection Board.

13. Failure to raise the issue of non-compliance with the Merit System Protection Board may constitute abandonment of his claim. See Lizut v

Department of the Army, 717 F.2d 1391, Court of Appeals, Federal Circuit 1983.

14. Additionally, there is nothing in the record to suggest the IRS treated on-the-job employees any differently then those on disability leave regarding promotional opportunities. All employees, it appears, are required to have on file a Form 4536 to be considered for promotion.

15. Whether or not the action of the IRS complies with the orders of the Merit System Protection Board is for the Merit System Protection Board in the first instance to determine.

Accordingly, Plaintiff's Motion for Summary Judgment is denied.

Defendants' Motion for Summary

Judgment is granted without prejudice to the rights of the Plaintiff to apply to the Merit System Protection Board for further relief regarding enforcement of its order.

The Court notes the voluminous filing of papers and exhibits, and failure of the parties to identify with particularity the particular provisions of such papers and exhibits applicable to their argument, as well as failure to identify with particularity the issues that were really in contest.

You may prepare an appropriate order,Mr. Zebot.

MR. ZEBOT: Thank you, your Honor.

MR. ROY: Thank you, your Honor.

THE COURT: I suppose I should make

the observation, that after going back to the Merit System Protection Board Plaintiff is dissatisfied, presumably he would then have the right to appeal again to this Court from any action it takes, and under the local rule either this case could be reopened or the new case would be assigned to this Judge.

MR ROY: Thank you very much, your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

CIVIL NO.
89-CV-71021-DT

vs

HONORABLE AVERN COHN
SECRETARY OF UNITED STATES
DEPARTMENT OF TREASURY;
INTERNAL REVENUE SERVICE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On January 31, 1990, defendants filed their motion to dismiss or for summary judgment or, in the alternative; to hold in abeyance plus brief and supporting papers. Plaintiff filed his answer to the motion (dated March 6, 1990) plus brief and supporting

papers. On March 14, 1990, defendants filed their reply brief plus supporting papers. Plaintiff filed his supplement to answer (dated March 14, 1909). On April 20, 1990, plaintiff served his motion to permit filing a motion for partial summary judgment on liability plus brief and supporting papers. On May 4, 1990, defendants filed their response and brief in opposition to plaintiff's motion plus supporting papers. On September 4, 1990, defendants filed their supplemental motion to dismiss or for summary judgment plus brief and supporting papers. On September 25, 1990, plaintiff served his motion for summary judgment on issue of liability plus brief and supporting papers. On

October 9, 1990, plaintiff served his answer to defendants' supplemental motion. On October 19, 1990, defendants filed their (1) response and brief in opposition to plaintiff's motion for summary judgment on the issue of liability and (2) reply brief (to plaintiff's answer to defendants' supplemental motion).

Hearing on the cross motions was held on December 17, 1990, both parties appearing through counsel.

For the reasons stated on the record in open court, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted without prejudice to

plaintiff's ability to apply to the Merit Systems Protection Board (MSPB) by way of petition for enforcement of the MSPB's March 6, 1990 Order.

Let judgment enter accordingly.

_____

AVERN COHN
U.S. DISTRICT JUDGE

Dated: Dec 19 1990

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

CHARLES E. GAVETTE, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBERS CH03538810382 Date: August 19, 1988

Lynn H. Shecter, Esquire, Roy, Shecter & Vocht, P.C., Birmingham, Michigan, for the appellant.

John A. Freeman, Esquire, Cincinnati, Ohio for the agency

BEFORE

Gregory A. Miksa
Administrative Judge

INITIAL DECISION

INTRODUCTION

By petition filed April 19, 1988,

appellant Charles Gavette submitted an appeal to the Board in which he contends that the agency violated his restoration to duty rights by denying him appropriate reinstatement on March 30, 1988, following his recovery within one year from a recurrence of a compensable work related illness (Record tab 1, Exhibit A to appeal).

TIMELINESS AND JURISDICTION

The agency initially moved that the appeal be dismissed based on timeliness and jurisdictional grounds. Specifically the agency contended that the appeal was barred by a March 11, 1988 formal complaint of discrimination and that the issues raised by the appeal were moot based on a June 1, 1988 settlement agreement in a separate proceeding previously initiated by appellant in the Federal District Court for the Eastern District of Michigan (Record tabs 3 and 9).

The issues raised in the agency's motion were addressed by the undersigned administrative judge in Orders dated July 8, 1988, and August 2, 1988, in

which I denied the agency's motion to dismiss. I have specifically found that appellant's April 19, 1988 appeal from the agency's denial of his October 13, 1987 restoration to duty request is both timely and subject to the Board's appellate jurisdiction. I have found that the June 1988 court settlement expressly preserved appellant's independent right to seek relief before the Board in this case for the alleged denial of his rights under 5 U.S.C.A. 8151 (West 1980) subsequent to the initiation of his separate discrimination suit. See 5 U.S.C.A. 7701(a) and 8151(b)(1); and 5 C.F.R. 353.401 (1988).

The agency representative

subsequently filed an August 9, 1988 motion requesting correction of a stipulated fact underlying my determination concerning the date of the agency's alleged response to appellant's March 11, 1988 formal discrimination complaint. The agency representative agreed on July 27, 1988 that the agency responded to appellant's March 11, 1988 formal complaint of disorientation on or about March 31, 1988. The agency states that it did not respond to appellant's March 11, 1988 formal discrimination complaint, but it has nevertheless agreed to the timeliness of appellant's appeal.

Appellant has not responded to the agency's motion to correct the record

concerning the existence of an agency response to appellant's March 11, 1988 formal discrimination complaint. Since it is clear, however, that the agency's denial of appellant's restoration to duty request was not issued until March 30, 1988, I find that appellant's March 11 1988 formal complaint of discrimination could not have covered the issues raised by appellant's instant appeal from that denial. I Find that the appeal is, accordingly, within the Board' 5 jurisdiction and timely under the Board's regulations. See 5 C.F.R. 1201.154(c) (1988).

STIPULATED FACT AND ISSUE

By stipulation in a telephone conference call with the party

representatives on August 1, 1988, the appellant waived his request to a hearing and the agency representative concurred in appellant's request to have the remaining stipulated issue in this case adjudicated on the record. The parties further stipulated that the sole remaining issue for adjudication in this appeal concerns the agency's possible denial of appellant's promotion rights, provided under 5 U.S.C.A. § 8151(b)(1) (West 1980) based on his recovery in under one year from the disability For which he received compensation, commencing on January 25, 1985 and terminating on January 8, 1986. This stipulation does not affect, however, adjudication of appellant's affirmative

defenses of age and handicap discrimination which has addressed by the parties in their final submissions to the Board.

The party representatives further stipulated during the August 1, 1988 telephone conference call that all promotions possibly at issue concern positions for which appellant would have been required to bid competitively. The also stipulated that appellant has been restored to duty at the GS-12, step 10, journeyman level for his Revenue Agent position, the position, grade and step he would have achieved if he had remained in his pre-disability position during his absence (See Record tab 15, Exhibit 9, Stipulation for Compromise

Settlement).

Accordingly, this initial decision is based on the written submissions and the documentary evidence submitted by the parties on or before the close of record date. For the reasons stated below, I find that the agency has not demonstrated that it has satisfied appellant's right to be considered for all promotions for which he would have been eligible as required under 5 U.S.C.A. § 8151(b)(1) and its March 30, 1988 denial of restoration is REVERSED as to this issue.

ANALYSIS AND FINDINGS

Background

In September 1979, the agency initiated action to obtain worker's

compensation benefits for appellant based on an emotional illness caused or aggravated by appellant's employment. That application was initially denied by the Department of Labor on April 29, 1981, and it was again denied on August 10, 1982. Subsequently, however, the Department of Labor granted (appellant worker's compensation benefits from August 3, 1979 to May 7, 1982 (Record tab 15, Agency Exhibits 1 through 3).

The agency also applied for disability retirement on appellant's behalf in 1980 with the Office of Personnel Management [OPM] This action that was opposed by the appellant and initially denied by OPM in April 1981.

On June 22, 1981, the agency filed a request for reconsideration with OPM, and OPM granted the agency's request for appellant's disability retirement in February 1982. Although appellant requested a copy of the agency's reconsideration request and supporting documentation from the agency in June 1981, this material was not furnished to appellant until March 1982, after OPM had granted the agency's reconsideration request. Appellant appealed the OPM decision to the Board and the Board sustained the OPM decision to grant appellant involuntary disability retirement.

The above facts concerning

appellant's disability retirement were set forth in a decision by the United States Court of Appeals for the Federal Circuit in Gavette v. Office of Personnel Management and the Department of Treasury, Appeal No. 84-1282 (Fed. Cir., February 1, 1985) (unpub.) (Record tab 18, Exhibit A). In that decision, the court reversed the Board's determination concerning the propriety of OPM's disability determination. Furthermore, the court criticized, on due process grounds, the respondent agency's refusal to provide copies of its reconsideration request and supporting documentation to appellant prior to OPM's reconsideration decision. The court also specifically determined

that the agency committed harmful procedural error when, in response to a psychiatric fitness-for-duty examination of appellant ordered by the agency in 1979 the agency failed to certify that transfer of appellant in accommodation of appellant's emotional illness was impossible. The court noted that this accommodation was recommended in the 1979 and 1980 fitness reports of board certified psychiatrist, Dr. Warren W. Goodwin.

As noted by the court in its decision, appellant initially sought to have the court reinstate him to his previous position at the agency to remedy the agency's harmful error. Appellant represented to the court in

oral argument, however, that he preferred to remain in the status of a disabled employee at the time of the court's decision. The court, accordingly, remedied the situation by remanding the case to the Board with instructions "that [appellant] be awarded the difference between the salary he would have received had he remained on active duty and the disability retirement pay he has received to the date of judgment and any other relief to which he is entitled in accordance with this opinion, less any earnings he has received from other employment in the interval." (Record tab 18, Exhibit A, page 12) (Emphasis supplied).

On December 23, 1985, appellant applied to the Department of labor claiming worker's compensation benefits for a recurrence of his emotional illness beginning in January 1985. This application was supported by a report from Dr. Goodwin, dated January 20, 1986. Dr. Goodwin's stated in this report that appellant was incapacitated for work from January 25, 1985 through approximately January 8, 1986 as a result of emotional illness experienced by appellant in part due to proceedings before the Court of Appeals for the Federal Circuit concerning his challenge to his involuntary retirement (Record tab 15, Exhibits 4 and 5). Dr. Goodwin's January 1986 report indicates that

appellant was able to fully resume the duties of his position with the agency as of January 8, 1986. On January 27, 1986 appellant applied to the agency for restoration to duty (Record tab 1, Exhibit D). This request was denied by the agency on February 20, 1986 based on appellant's asserted "disabled" status (Record tab 1, Exhibit C). Appellant's December 1985 worker's compensation claim was also initially denied by the Department of Labor on June 24, 1966, and again on October 17, 1986 (Record tab 15, Exhibits 6 and 7). This claim was ultimately granted by the Department of Labor, however, on September 16, 1987. The Department of Labor approved worker's compensation benefits for the

period January 25, 1565 to January 8, 1986 (Record tab 15, Exhibit 8).

Following receipt of the Department of Labor's final decision concerning his compensation claim, appellant immediately renewed his request for restoration to duty by submitting another copy of his January 27, 1986 letter to the agency. The letter was received by the agency on October 13, 1987 (Record tab 1, Exhibit B). Appellant appeals from the agency's March 30, 1986 denial of this restoration request.

Analysis

The applicable statutory provision

under which appellant seeks relief, 5 U.S.C.A. § 8151, states in pertinent part:

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management--

(1) the department or agency which was the last employer shall immediately and

unconditionally accord the employee, if the injury or disability has been overcame within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume, his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, <u>including the right to tenure, promotion and safeguards in reductions-in-force procedures</u>, ... (Emphasis supplied).

In Raicovich v. United States

Postal Service, 675 F.2d 417 (1982), the Court of Appeals for the Federal Circuit stated that in enacting this statutory provision, "Congress sought to accord injured workers treatment equal to that which they would have received but for their injury." Id. at 424.

I find for purposes of this decision that the February 1, 1985 decision of the Court of Appeals for the Federal Circuit concerning the respondent agency's action in seeking appellant's involuntary retirement operated to constructively restore appellant as if he had been actively employed by the agency from May 7, 1982 (when his initial period of compensation ceased) to the date of the court's

judgment. This determination is supported by the Department of Labor's determination that appellant's work related disability ceased as of May 1982, and Dr. Goodwin's January 1986 report showing that appellant could have worked in his previous position with the agency sometime between November 1982 and December 1984 (Record tab 15, Exhibit F).

Concerning the agency's assertions in its final argument for the record that appellant's disability during 1985 is not employment related, I find that the Department of Labor's September 16, 1987 determination that appellant suffered a recurrence of his emotional illness, due to a factor related to his

employment, is not subject to collateral attack in the instant Board proceeding. The Secretary of Labor is exclusively charged, under 5 U.S.C.A. § 8149 (West 1980) with making "final decisions" concerning such employee claims. I, accordingly, find that appellant is eligible for the employment rights afforded a person who demonstrates that he has overcome a compensable disability within one year of commencement of benefits for recurrence of a work related disability under 5 U.S.C.A. § 8151(b)(1). See Hogg v. United States Postal Service, 29 M.S.P.R. 153, 156-157 (1985) (Board has jurisdiction if employee shows that he is eligible for restoration rights under 5 U.S.C.A. §

8151 and alleges that his rights have been violated).

As observed in my August 2, 1988 Order to the parties, the Board held in Metsopulos v. United States Postal Service, 33 M.S.P.R. 536, 539 (1987), that it is the agency's burden to submit evidence regarding available positions (including competitive supervisory positions if at issue) and any restrictive qualifications requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee as required under the statute and OPM regulations. See also Whitfield v. United States Postal Service, 5 M.S.P.R. 239 (1981). I note that the employee's rights in Metsopulos

derived from section 8151(b) (2), not section 8151(b) (1) herein applicable which imposes on the agency the additional specific obligation to show that it has granted employees who recover in under one year their right to promotions. Furthermore, the Board has held that it is the agency's burden to produce specific factual information that an employee's restoration rights were fully granted. See Hogg, at 156-157.

Under 5 C.F.R. § 353.302 (1988) of OPM's regulations governing restoration to duty, an employee who recovers from a disability within one year of commencement of compensation or from the

time compensable disability recurs is entitled to resume his or her former position (or an equivalent position) "immediately" upon cessation of compensation benefits. (Emphasis supplied) Under 5 C.F.R. § 353.201 (1987) of OPM's regulation the agency was required to consider an employee who was "absent" due to a compensable injury for "all promotions" for which he would be considered were he not absent. Although the parties agree that the latter requirement was eliminated from OPM's regulations, effective February 16, 1988 (See 53 Fed. Reg. 353 (January 19, 1988) and Record tab 18, Exhibit D), I find that this requirement is binding on the agency herein in light of its

applicability 1) at the time appellant's benefits ceased, 2) at the time appellant and the agency were notified by the Department of Labor of the status of appellant's December 1985 compensation claim, 3) and at the time of appellant's October 1987 application for restoration.

Concerning the agency's final argument that it had no available promotion opportunities during the period appellant received compensation from the Department of Labor, from January 25, 1985 to January 8, 1986, I find that the agency was responsible to consider appellant for promotion opportunities that became available

after January 8, 1986 through the date of his application for restoration. I base this finding on the absence of any specific restriction in section 353.201 of OPM's 1987 regulations which would limit an employee's consideration for promotions only to the period an employee was in receipt of disability compensation.

Moreover, in Withers v. Department of the Air Force, 28 M.S.P.R. 379, 385 (1985), the Board held that agencies have a duty to both partially recovered and fully recovered employees to consider suitable positions for restoration on a nationwide basis, absent evidence showing circumstances which would make such a job search

inappropriate in a particular case. In the Instant case the agency's argument and evidence shows that it has considered appellant only for promotional opportunities that became available during appellant's absence in the Detroit District of the agency. No other evidence was offered to show what circumstances if. this case would preclude a nationwide search. See also Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227 (1984).

Findings

It is clear from the decision of the Court of Appeals for the Federal Circuit concerning appellant's

involuntary retirement that immediately prior to appellant's initial absence for disability in 1979 (after eighteen (18) years of satisfactory or better service) he had been placed as a GS-12 Revenue Agent on the agency's promotion roster for GS-13 positions with the agency. Although he may not, thereafter, have had a right per se to a competitive promotion, the agency's evidence and argument in this case shows that it has not considered appellant for all such promotion opportunities that arose during his absence from January 25, 1985 to the date he applied for restoration in October 1987. I therefore find that the agency has failed to establish, by preponderant evidence, that it has fully

complied with the provisions of section 8151(b) (1) of the statute and applicable OPM regulations by 1) granting appellant his right to consideration for all promotional positions for which he would have been competitively considered but for his absence because of a compensable disability, and restoring him to an acceptable Grade 13 or higher position consistent with his qualifications and the agency' s merit promotion policy effective on the date of his application for restoration (Record tab 18, Exhibit D, OPM letter to appellant concerning agency's obligation to consider restored employee's for promotion under its i987 regulations). See Cox v. United States

International Trade Commission, 15 M.S.P.R. 455, 458–459 (1983).

AFFIRMATIVE DEFENSES

Appellant generally asserts that the agency's denial of a promotion that he would have received during the period of his absence from work on an after January 25, 1985 constitutes age and handicap discrimination in violation of 5 U.S.C.A. §§ 2302(b)(B) and (D) (West Supp. 1988). The burden is on appellant to prove by a preponderance of the evidence the validity of any affirmative defense raised. 5 U.S.C.A. § 7701(c)(2)(B) (West 1980); 5 C.F.R. § 1201.56(b) (1988).

The criteria necessary to establish

a prima facie case of age discrimination in violation of sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C.A. §§ 631 and 633a [West 1985]) include 1) that appellant is in the protected age group, 2) that he received treatment not accorded those outside the protected age group, and 3) that consideration of age was a factor in the decision to take the action from which the appeal was filed. See Mahurin v. Department of the Air Force, 4 M.S.P.R. 302, 305 (1980).

Although appellant, who is currently fifty-five years of age, is in the protected age group, he has not produced sufficient evidence to show

that he has been accorded treatment not accorded those outside his protected age group, or that age was a factor in denying him any restoration right under 5 U.S.C.A. § 8151. I, accordingly, find that appellant has not sustained, by preponderant evidence, his charge that the agency's failure to accord him his full rights under the statute is the result of age discrimination.

Concerning appellant's claim of handicap discrimination, appellant must establish that he is a "qualified handicapped person" under 29 C.F.R. § 1613.702(f) (1987), and that the agency has failed to accommodate his handicapping condition. Appellant may show that he is a qualified handicapped

person if he demonstrates that he is a handicapped person within the meaning of 29 C.F.R. § 1613.702(a), and if he articulates a reasonable accommodation under which he can perform the essential functions of his claimed position without endangering the health and safety of himself or others. In order to establish a prima facie case of discrimination, appellant must also establish a causal connection between his handicapping condition, and the conduct that he charges constitutes discrimination. See Conti v. Department of the Army, 34 M.S.P.R. 272, 277 (1987); and Milled v. Department of Health and Human Services, 23 M.S.P.R. 128, 132-134 (1984), aff'd, 770 F.2d 182

(Fed. Cir. 1985). Once a prima facie case of discrimination is established, the burden of going forward with the evidence, but not the ultimate burden of persuasion, shifts to the agency to demonstrate that its action was based on some legitimate non-discriminatory reason. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 892 (1973). If the agency's reason is sufficient to rebut the prima facie case of discrimination, the appellant is afforded the opportunity to demonstrate that the reason for failing to accommodate the handicapping condition is pretextual. See Stalkfleet v. United States Postal Service, 6 M.S.P.R. 637, 647-48 (1981).

In this case the record shows that

appellant has both a history of suffering from employment related and disabling emotional illness which was also perceived by the agency as limiting a major life activity, appellant's ability to work. Furthermore, the record shows that the agency acted on this perception by filing for disability retirement on appellant's behalf. I, accordingly, find that the evidence of record establishes that appellant is a handicapped employee within the meaning of 5 C.F.R. § 1613.702(d) and (e) (1987).

Appellant generally contends in his final submission to the Board that he has been discriminated against by virtue

of the agency's denial of an immediate promotion to the position of "CEP Team Coordinator," a GS-13 position (Record tab 18, page 9). Appellant further contends in an unsigned affidavit attached to, his August 16, 1588 submission, that in 1979 he had been "promised the next available promotion" (Record tab 18, Exhibit G, attached affidavit). This statement is somewhat contradicted, however, by the February 1985 decision of the Court of Appeals for the Federal Circuit which noted that although appellant had been placed on a promotion roster as a GS-12 Revenue Agent, he had been forced to grieve his placement on the bottom of this roster (Record tab 18, Exhibit A).

It is unclear from the record whether appellant's grievance resulted in a determination to place appellant in a GS-13 position. Appellant, moreover, produced no information showing the performance requirements for the GS-13 Team Coordinator position. Nor did he provide information showing his current qualifications for, and ability to perform, the duties of the position. I, accordingly, find that appellant's allegations are insufficient to show, by preponderant evidence, that appellant is able to perform the duties of the Team Coordinator GS-13 position, with or without reasonable accommodation and without endangering the health and safety of himself or others.

Accordingly, I do not find that appellant has established a prima facie case of discrimination on this record by virtue of the agency's previous failure to appoint him to this position, and his allegation of discrimination is, accordingly, not sustained.

I further find that any other issues of discrimination that pertain to the agency's asserted inappropriate refusal to employ appellant, apart from appellant's generally claim to a promotion under 5 U.S.C.A. § 8151(b) (1) were resolved in the June 1988 settlement agreement which resulted in appellant's reinstatement as a Revenue Agent, GS-12, Step 10 with the agency in July 1988.

My determinations concerning appellant's affirmative defenses, however, should not be construed to foreclose the agency from considering and, if appropriate, appointing appellant to the claimed GS-13 CEP Team Coordinator position if appellant's actual qualifications, and/or any previous grievance settlement, provide him a right to this position pursuant to 5 U.S. C.A. § 8151(b) (I) applicable OPM regulations, and the Order I have stated below.

DECISION

The agency's determination to deny appellant consideration for competitive

promotions, nationwide, during the period of his absence from January 25, 1988 to October 13, 1987 is REVERSED.

ORDER

The agency is hereby ORDERED to consider appellant pursuant to 5 U.S.C.A. § 8151(b) (1) and 5 C.F.R. § 353.201 (1987), for; restoration to any position at Grade 13 level or higher for which he would have been considered if he had been present from January 25, 1985 to October 13, 1987. The agency must therefore, identify positions on a nationwide basis retroactive to January 25, 1985 and continuing through October 13, 1987 for which appellant would have been eligible to compete for promotion, and to determine whether appellant was

qualified based on his fully recovered status from his disabling emotional condition through October 13, 1987. The agency is further ORDERED to make every effort to restore appellant to an acceptable higher graded position if such restoration would be in accord with the agency's merit promotion plan (See Record tab 18, Exhibit D, OPM letter to appellant dated April 15, 1988). Proof of compliance with this decision must be submitted to this office within twenty (20) days after this initial decision becomes a final decision of the Board. See Withers v. United States Postal Service, 28 M.S.P.R. 379, 385.

The agency is also ORDERED to issue, if appropriate, a check to

appellant for the appropriate amount of back pay and benefits in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency in furtherance of compliance.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this

initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the age about its intentions.

FOR THE BOARD: _____
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on SEP 23 1988 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must

file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either

mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for

judicial review of both discrimination and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be <u>received</u> by the court

of appeals no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no' later than 20 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the enclosed Decision was sent by regular mail this date to each of the following:

Appellant

Mr. Charles E. Gavette
6816 Blue Grass
Clarkston, Michigan 48016

Appellant's Representative

Lynn H. Shecter, Esquire
Roy, Shecter & Vocht, P.C.
877 S. Adams, Ste 302
Birmingham, Michigan 48011

Agency's Representative

John Freeman, Esquire
Department of the Treasury
Internal Revenue Service
550 Main. Street, Room 6108
Cincinnati, Ohio 45202

Other

Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

August 19, 1988
(Date)

Pat DuBrock
Legal Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES E. GAVETTE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL
	)	FROM THE
INTERNAL REVENUE SERVICE,	)	UNITED
	)	STATES
Defendant-Appellee,	)	DISTRICT
	)	COURT FOR
	)	THE
	)	EASTERN
	)	DISTRICT
	)	OF MICHIGAN

DECIDED AND FILED _____

BEFORE: NORRIS and SILER, Circuit Judges; and WELLFORD, Senior Circuit Judge.

PER CURIAM. Plaintiff Charles Gavette, appeals from the order of the district court granting summary judgment to defendant, Internal Revenue Service ("IRS"). In his complaint, plaintiff alleged, in essence, that the IRS failed

to notify him of re-employment and promotion rights in violation of federal laws prohibiting discrimination on the basis of age and handicap, resulting in loss of promotion and career opportunities.

The plaintiff filed all of his grievances, at one time or another, with the Equal Employment Opportunity Commission (EEOC) agency and the Merit Systems Protection Board (MSPB). The EEOC agency denied him relief on all counts and notified the plaintiff of his right to sue in district court. After the plaintiff filed with the MSPB, the MSPB ruled in his favor in certain respects and rendered a final decision in the matter on March 8,

1990. The defendant complied with the MSPB order and notified the plaintiff of its substantial compliance on May 7, 1990, and the plaintiff did not contest that compliance in a timely manner.

In granting summary judgment to the defendants, the district court held that, as to the MSPB process it had no subject matter jurisdiction to hear any matters concerning the defendant's compliance with the MSPB order because the plaintiff had not first appealed to the MSPB. The court further held that there was no evidence in the record of discrimination against this plaintiff. This court will address that part of the district court's opinion holding that there was no evidence of discrimination.

With respect to this holding, the district court noted:

> [T]here is nothing in the record to suggest the IRS treated on-the-job employees any differently then [sic] those on disability leave regarding promotional opportunities. All employees, it appears, are required to have on file a Form 4536 to be considered for promotion.

---

1 There was some confusion to whether the plaintiff challenged the decision of the EEOC agency or the MSPB in the district court. Under C.F.R. 1613.403, a plaintiff may filed a "mixed case complaint" with the appropriate EEOC agency or the MSPB, but not both. This plaintiff chose to follow both avenues of relief and was apparently allowed to proceed in both fora. the plaintiff's complaint, it appears that he is suing pursuant to his right to sue letters from the EEOC agency. In open court, however, the plaintiff's counsel agreed that the only issue on appeal was as to the defendant's compliance with the MSPB order. Because the district court addressed the results of both fora, this court is not is not obligated

to decide which course of conduct should have been followed.

. . . .

> The Court notes the voluminous filing of papers and exhibits, and failure of the parties to identify with particularity the particular provisions of such papers and exhibits applicable to their argument, as well as failure to identify with particularity the issues that were really in contest.

Our examination of the record on appeal leads us to agree with the district court's conclusion that none of plaintiff's filings satisfied his burden to respond to defendant's motion for summary judgment, as required by the Celotex trilogy of cases and its progeny. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) Anderson v Liberty

Lobby. Inc. 477 U.S. 242 (1986); Matsushita Electric Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986) We review a grant of summary judgment de novo. McAdoo v. Dallas Corp., 932 F.2d 522, 523 (6th Cir. 1991) Inferences are drawn in a light most favorable to the non-movant, but "summary judgment may be granted where the evidence is merely colorable or is not significantly probative." Id. at 524.

On appeal, plaintiff points to some evidence that he says demonstrates that he was the victim of disparate treatment--that, as a handicapped person, he Did not receive notifications afforded able-bodied employees. However, that is not the theory upon which

plaintiff proceeded in the trial court. There, he argued that IRS' failure to follow notification requirements was, ipso facto, discriminatory. He supported his argument with a small portion of the deposition of Sharon Hays, a personnel staffing specialist of the defendant, which indicated that she never personally notified individuals who were absent from work on workers' compensation of promotion opportunities. Plaintiff argued that handicapped persons were not advised of their rights, hut did not point out evidence demonstrating that on-the-job able-bodied employees received that advice. The defendant did, in fact, post notices on a bulletin board at the

workplace giving information as to when certain jobs were open and when it planned to hire. The plaintiff failed periodically to check the posted notices or call the office of personnel management for promotion information.

Accordingly, because the plaintiff did not posit to the district court a viable theory of discrimination supported by summary judgment evidence, we hold that the district court did not err in reaching its decision. The judgment of the district court is accordingly **AFFIRMED.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

CHARLES E. GAVETTE

Plaintiff,

v

89-CV-71021-DT

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY;
INTERNAL REVENUE SERVICES,

Defendants.

DEPOSITION OF SHARON HAYS

The discovery deposition of Sharon Hays, taken before me, Marcia M. Muonio, Notary Public and Court Reporter acting in the County of Oakland, State of Michigan, on Wednesday, March 7, 1990, at 877 South Adams, Suite 302, Birmingham, Michigan 48009, commencing at about 12:45 p.m.

APPEARANCES: LYNN H. SHECTER
877 South Adams, Suite 302
Birmingham, Michigan 48009
Appearing on behalf of the
Plaintiff.

FRANCIS L. ZEBOT
817 Federal Building
Detroit, Michigan 48226
Appearing on behalf of
the Defendants.

REPORTED BY: MARCIA M. MUONIO,
CSMR-4084
P. O. Box 52522
Livonia, Michigan 448152

ALSO PRESENT: CHARLES E. GAVETTE
JAMES E. ROGERS. JR.

I N D E X

WITNESS:	PAGE:
SHARON HAYS	
Cross-Examination by Ms. Shecter	3

EXHIBITS:	MARKED:
Deposition Exhibit Number Óne	11
Deposition Exhibit Number Two	13
Deposition Exhibit Number Three	17
Deposition Exhibit Number Four	18
Deposition Exhibit Number Five	21
Deposition Exhibit Number Six	23
Deposition Exhibit Number Seven	29
Deposition Number Eight	64

Birmingham, Michigan
Wednesday, March 7, 1990
At about 12:45 p.m.

S H A R O N H A Y S,

having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, Has examined upon her oath and testified as follows:

MS. SHECTER: This is the deposition of Sharon Hays taken pursuant to notice and stipulation of Counsel for both purposes under the Federal Rules of Evidence and the Federal Court Rules.

CROSS-EXAMINATION

BY MS SHECTER:

Q You are Sharon Hays, H-a-y-s?

A Correct.

Q What is your address, please?

A 477 Michigan Avenue, Detroit, Michigan 48232.

Q What is your home address?

A 36990 Gordon Lane. That's G-o-r-d-o-n L-a-n-e, Mt. Clemens, Michigan 48043.

Q You are currently employed by whom?

A By the Internal Revenue Service.

Q In what capacity?

A A personnel staffing specialist.

Q What's your responsibility?

A My responsibility is to assist managers with their staffing needs, determine employees' eligibility for promotion action, and to work on special programs in the personnel area.

Q And what was the third, to work on?

A Special programs in the personnel

area.

Q What's a special program?

A We have a variety of special programs, such as retirements, workmen compensation cases, priority consideration. Those' are a few of them.

Q What is your level, GS what?

A GS-11.

Q Do you have ultimate decision, for example, in determining an employee's eligibility for promotion?

A Yes.

Q So you are the person who makes that decision; is that correct?

A Whether they qualify for the position?

Q Yes.

A Correct.

Q You don't decide who gets the promotion?

A Right.

Q What goes into deciding if someone's qualified for the promotion?

A We have qualification standards that we use as references. And we pull the personnel folders and go through their work experience, prior work experience,
and their current position.

Q Do you make judgments then about whether a person's background and experience fits within the criteria set forth in the qualifications that you've described?

A Yes.

Q Where are the qualifications for

promotions that you've described found?

A Internal Revenue Manual 0338.

Q Would you repeat that, please?

A Internal Revenue Manual 0338; it's the Qualification Standards and Guideline Handbook.

Q You are looking at something to answer the question, What are you looking at?

A This is just my notes.

Q May I see them, please?

A Sure. I believe you have a copy.

Q That's the cover letter that was accompanying?

A Uh-huh. That's just to show you what we have attached. We have -- oh, excuse me.

MR. ZEBOT: I would indicate that

that cover sheet mentioning that provision was with the documents, right?

MS. SHECTER: That's what I was looking at, sure.

BY MS. SHECTER:

Q Where else did you say it was contained? And then I want to get to these documents.

A We also have general guidelines for some positions.

Q What do you mean by that?

A This is a single -- we have single agency positions and -- I don't know what you call the other. Let me think. And then we have positions that's used for all of Internal Revenue Service.

Q What do you mean by a "single agency position"?

A Single agency is just a position that just pertains to our agency.

Q But then you said "and then for all IRS positions." Isn't the IRS the single agency?

A I'm trying to think of how to say them.

Q Take your time thinking about it.

MR. ZEBOT: Yes.

MS. SHECTER: I'm not here to trick you. I just want to learn things, and you were designated as a person who could educate me.

THE WITNESS: I can't recall what the other is called. We mainly use the Internal Revenue Manual 0338.

BY MS. SHECTER:

Q Well what's the difference between

a single agency position and what you described as an IRS?

A For like criminal investigator, Internal Revenue agent we have our own guidelines, the IRM 0338.

Q Okay.

A For a tax examiner, a clerk, that's used throughout the area, then we use a general standard.

Q But they're all IRS employees, aren't they?

A Right. I'm sorry, they are all in the IRS. I'm sorry. They are; they're all filed in IRM 0338.

Q So what were you referring to when you were talking about something other than a single agency?

A It was a general standard that

multiple positions are listed on that --

Q Multiple positions for what?

A Well, like tax examiner, clerk, secretary, we go by a general standard. And this is specific.

MR ZEBOT: Off the record just a moment.

MS. SHECTER: Yes, I think we're both getting hopelessly confused.

(Discussion held off record)

MS. SHECTER: While we were off the record, -- we're on the record now -- there was a discussion among Ms. Hays, Mr. Rogers, Mr. Zebot.

BY MS. SHECTER:

Q So that I understand that, when you talked about single agency positions, these were positions unique to the IRS. But there were other positions which had general application to positions throughout the government such as a clerical position, which was not specifically unique to IRS. Is that what you're talking about?

A Correct.

Q How long have you been a personnel staffing specialist?

A Since 1984, six years.

Q And has that been in the Detroit district office?

A Yes.

Q And prior to that, what did you do?

A Prior to that I was a personnel

clerk and a classification clerk and a timekeeper.

Q When were you a personnel clerk, during what period of time; obviously prior to '84?

A 1983 to 1984. I have a total of 18 years' service.

Q How many other personnel staffing specialists, GS-11, are there in the Detroit district?

A Three.

Q And who are the other two?

A Sherry Chagnon.

Q Can you spell her last name for the court reporter?

A C-h-a-g-n-o-n.

Stephanie Gracey, G-r --

Q How do you spell that, p-h or --

A S-t-e-p-h-a-n-i-e, Gracey, G-r-a-c-e-y. And Joyce Paul is our recruitment coordinator. She's also a Grade 11.

Q Joyce?

A Paul, P-a-u-l.

Q Do your responsibilities differ at all from Ms. Chagnon or from that of Ms. Gracey?

A No.

Q So you all three do the same thing?

A Yes, but -- except for those special programs.

Q You're the only one that does that

A No. We all have separate programs that we're responsible for.

Q And your special programs are retirement, work comp?

A No. My special program is workmen compensation cases for examination division, priority consideration program.

And Stephanie Gracey -- we each have our own particular division, and then we handle the work load for that division. Like whatever comes in for a workmen's comp case --

Q And Stephanie Gracey, you were about to tell me?

A She handles retirements and the management careers program.

Q And Sherry Chagnon?

A Sherry handles the privacy act program and the drug abuse program, and both of those handle their own workmen compensation claims, also.

Q Do you have now or have you ever had any responsibility for the retirements program?

A No.

Q Do you have now or have you ever had responsibility for the management careers program?

A No.

Q Do you now or have you ever done any work on special programs connected with the retirements program?

A No

Q And what about the management careers program?

A I'm the flack-up to Stephanie Gracey.

Q So when she's overloaded or out, you do it?

A When she's on vacation, uh-huh.

Q Now, pursuant to a request for documents, you brought some materials with you today that I see stacked in front of you.

Do you want to go through and identify what they are? I know we have a cover sheet, but we'd like that on the record, and I'd like to be able to ask you some questions if I don't understand what something is.

A Okay. I brought the Internal Revenue Manual 0338. Qualification Standard and Guideline Handbook.

Q Why don't we pull that out and have that marked so that I know which

document that is? And then you can explain to me what it is and what its significance is.

A Okay. It should be the first item in your package. That's the letter from Frank. It should be the next -- right here, this is it.

Q It would be just this?

A Right.

MS. SHECTER: Let's have that marked then as Deposition Exhibit One.

(Whereupon Deposition Exhibit Number One was marked by the court reporter)

THE WITNESS: The next item is Article 13.

MS. SHECTER: Wait a second.

THE WITNESS: Okay.

MS. SHECTER: I should have asked you before we began, but for some reason I assumed that you already had deposition experience. Perhaps you haven't.

Have you ever had your deposition taken before?

THE WITNESS: No.

MS. SHECTER: This is your first?

THE WITNESS: This is my first.

MS. SHECTER: All right. It won't be that bad. You've had a chance to talk with your attorneys though, haven't you?

THE WITNESS: Correct.

MS SHECTER: And so they've told you what a deposition is like; is that correct?

THE WITNESS: Yes.

MS. SHECTER: So that you know if you answer a question, we're going to assume you intended that answer unless you tell us otherwise, correct?

THE WITNESS: Correct.

MS. SHECTER: And you're doing a wonderful job giving your answer verbally, which is the hardest part of deposition, I promise, because she gets angry when you go "uh-huh" because she can't take that "uh-huh." Do that and no problem.

BY MS. SHECTER:

Q Okay. That's Deposition Exhibit One.

What's our next document?

A The next document is Article 13, Promotion and Other Competitive Actions,

NORD III. That's taken from our contract.

Q All right. Before I mark that, let me ask you, my copy says NORD III on top.

A Uh-huh.

Q What does that mean?

A That's the national agreement between the union and the IRS employees.

Q And down below I have something written that says, "temp. prom. bargaining to non-bargaining can't exceed 120 days. Do you have that on your copy? You're looking as if you don't have it on your copy. I'll show you my copy.

MR. ZEBOT: Wait. She's not looking at the right one.

THE WITNESS: Oh, okay. That's just my note.

BY MS. SHECTER:

Q Okay. What does that mean?

A That's just if somebody applies for a position, for a temporary promotion, it can't exceed 120 days without competition. That's just a personal note. It doesn't have anything to do with this case.

MS. SHECTER: Let's mark that then as

Deposition Exhibit Two, and we'll come back and I'll ask you some questions.

THE WITNESS: Okay.

(Whereupon Deposition Exhibit Number Two was marked by the court reporter)

(Discussion held off record)

BY MS. SHECTER:

Q Okay. What's our next document?

A The next document is IRM 0335.2, service-wide promotion plan.

Q Now, what is the IRM? You've referred to that before.

A The Internal Revenue Manual.

Q And what is it?

A And that's our regulations.

Q So that everything you do pertaining to personnel is controlled by the IRM?

A Correct.

Q Does the IRM in all instances track the FPM, the Federal Personnel Manual?

A We base the Internal Revenue Manual from the Federal Personnel Manual to fit

our own needs.

Q Is it fair to say that in all instances, the IRM would agree with the FPM, the Federal Personnel Manual?

A Yes.

Q Than why do you need the IRM?

A Not all instances. I don't

Q In some instances?

A I'm not sure. I would have to compare the IRM with the FPM.

Q So you don't know. There may be some instances where they conflict?

A Right.

Q Where they conflict, what controls?

MR. ZEBOT: If you know.

THE WITNESS: I don't know.

MR. ZEBOT: Off the record for a minute.

MS. SHECTER: Sure.

(Discussion held off record)

MS. SHECTER: Back on the record.

MR. ROGERS: Just for the sake of clarification --

MS. SHECTER: Thank you, Mr. Rogers. We appreciate that.

MR. ROGERS: Thank you. There's basically three different areas that are controlling the areas of promotion and whatever; those being the Federal Personnel Manual that you mentioned the Internal Revenue Manual, which is the IRS regulations, and the third item being the NORD agreement between the National Treasury Employees Union and the Internal Revenue Service.

Normally and under most

circumstances, unless there's court cases, otherwise the NORD agreement would be controlling in regards to the IRM, and the IRM has been deemed to be controlling in regards to the FPM.

MS. SHECTER: So that your collective bargaining agreement would control over anything that involved the collective bargaining unit?

MR. ROGERS: That's correct.

MS. SHECTER: And that's the NORD, correct?

MR. ROGERS: That's correct.

MS. SHECTER: Now, I take it that the IRM) is just more specific than the FPM; is that accurate?

MR. ROGERS: Yes, it's more specifically I related to IRS business

and work.

MS. SHECTER: What's the basis for saying that if there's a conflict between the IRM and the FPM, that the IRM controls? What's the basis for that?

MR. ROGERS: Can we go off the record? I have a feeling that I'm testifying.

MR. TALBOT: Yes, it's getting close to that. I thought we were going to have a simple deposition.

(Discussion held off record)

MS SHECTER: Let's go back on the record.

BY MS. SHECTER:

Q Just so that we can establish -- I'm not sure what the last testimony Ms.

Hays gave, but based on the discussion that we've had with Mr. Rogers and Mr. Zebot, some of which was off the record, it's clear that the issue of conflict if any between the FPM and the IRM is a matter of legal determination.

And you'd agree with me that you are not competent to indicate what would happen in a particular instance; is that correct?

A I'm not sure, right.

MS. SHECTER: And so this IRM 0335.2 becomes Deposition Exhibit Three then.

(Whereupon Deposition Exhibit Number Three was marked by the court reporter)

BY MS. SHECTER:

Q Our next document, please?

A I've attached a copy of position descriptions for the Grade 13 Internal Revenue agents that were filled during 1986 through July of 1988.

Q And if I understand it, just looking at my document -- because it's attached with a rubber band, I want to just make sure that my packet agrees with yours.

There's a packet stapled that has -- the first document has, number one, agency position number 04082N in the upper right-hand corner?

A Correct.

Q And then there's another stapled-together document, which has IRS and it looks to me -- is it SFD?

A SPD.

Q SPD number 91269E?

A Correct.

Q And then the next stapled-together packet is IRS, SPD number 90725E, correct?

A Correct.

Q And then the next packet is IRS, SPD number 90296E; is that correct?

A Correct.

And the last is -- I'm sorry. The next is 90469E?

A Correct.

Q And 90922E?

A Correct.

Q And then the last is position description 04505E in the upper right-hand corner?

A Correct.

MS. SHECTER: And that becomes our Deposition Exhibit Four. Does everybody agree on that?

(Whereupon Deposition Exhibit Number Four was marked by the court reporter)

BY MS. SHECTER:

Q Our next documents?

A It's promotion packages for Grade 13 Internal Revenue agents. These packages include the roster of eligibles for promotion and promotion certificate, minutes of the ranking official, evaluative material and the person selected, and the announcement If it was available.

Q Okay. Because this was attached

with a rubber band, I just want to make sure that my packet agrees with yours.

The first, roster of eligibles for promotion and promotion certificate, that's dated 5-8-86, and my certificate number appears to be written over. Is this '86 or '85?

A Eighty-six.

Q And dash, what is that?

A Fifty-eight.

Q Okay. The next is 9-9-86, 86-139?

A Correct.

Q The next is 1-20-87, certificate number 87-11?

A Correct.

Q The next is date 1-20-87, 87-12?

A Correct.

Q And 1-20-87, 87-13?

A Correct.

Q 2-12-87, 87-49?

A Correct.

Q 2-24-87, 87-64?

A Correct.

Q 4-7-87, 87-94?

A Correct.

Q 4-16-87, 87-99?

A Correct.

Q 10-30-87, 87-194?

A Correct.

Q Then I have something that says Detroit district vacancy announcements. Is that the next document you have?

A Yeah, but that's, I think -- let's see.

Q Is there something that should be before?

A Yes, that should be attached to the 87-194. The stapler must have just --

Q Okay. That is that packet.

And then next is the 3-4-88, 88-20?

A Correct.

Q 8-31-88, 08-187-01?

A Yes.

Q Is that it in that packet?

MR. ZEBOT: I'm sorry. What was the last one?

MS. SHECTER: 88-187-01, 8-31-88.

MR. ZEBOT: Let me see this.

THE WITNESS: You've got 20-88?

MR. ZEBOT: Yes. That's all I had in there.

THE WITNESS: Maybe it's just continued -- no.

MS. SHECTER: That's why I go through packages with rubber bands.

MR. ZEBOT: That's a good idea. Maybe I better make a note of that number.

What is that number?

MS. SHECTER: That number is 8-31-88,

certificate number 88-187-01.

And this is becoming Deposition Exhibit Five then.

THE WITNESS: This is all together.

MS. SHECTER: There's more?

THE WITNESS: Yeah.

MS. SHECTER: That's the first rubber band. Let's make that first rubber band Five, and then we can go to Deposition Exhibit Six, because

otherwise were going to get awfully confused if we're not going to have separate deposition exhibits.

(Whereupon Deposition Exhibit Number Five was marked by the court reporter)

MR. ZEBOT: you have any clips or additional rubber bands by any chance?

MS. SHECTER: (Shaking head).

MR. ZEBOT: No, okay. That's all right. I don't want to slow things down.

BY MS. SHECTER

Q Understanding that the next packet is a continuation of the category, was it Five or Six that you're reading from?

A Six, promotion packages. This is the only last one for the regular

revenue agents. See, these were rubber banded because this was such a huge package.

Q I understand. This, what were working on now, is going to be marked as Deposition Exhibit Six, and let's make sure that my packet agrees with yours.

Date 1-28-88, certificate 88-75?

A Correct.

Q Then you tricked me, and this looks different.

A No, that all belongs to package 88-75.

Q So that will be -- let's make sure that at least the stapled packets are together.

I have a date of 1-25-88, O'Malia, Thomas?

A Correct.

Q The name is F-i-c --

A Ficsor, uh-huh.

Q S-a-r-a-l-t-a?

A Uh-huh.

Q Brennan, Terrence; Wynan Yee (phonetic), Sheryl; Sloane, Michael. And then part B, critical elements of position to be filled?

A All right. That should go with --

MR. ZEBOT: Off the record.

(Discussion held off record)

BY MS. SHECTER:

A Okay. George Zak then becomes the front, and the part B is attached to George Zak's packet?

A Right.

Q William -- what is that?

A G-n-i-e-w-e-k.

Q Albrecht (phonetic), Rosalie; H-e-i-l-a-la, Robert; W-e-r-n-e-r-t, Stephen; B-u-l-i-r, Wesley; Paschke, Thomas; W-a-y-c-a-l-e-w-y-c-z, Ronald; W-I-I-e-m-s-e-n, Michael; Clifford, Thomas; E-a-r-e-g-o-o-d, T-h-e-a-r-o-n; R-o-i-v-e, Stephen; Fitzner (phonetic), Ralph; G-r-o-h, Joseph; Van Eerden, William; and then A-b-e-s-a-m-i-s, Jesse. Is that that packet?

A Right, yes.

Q Anywhere in Deposition Exhibit Five, which is the first packet, and Deposition Exhibit Six, which is about to be marked, does it indicate whether any of these candidates were on worker's compensation?

A No.

(Whereupon Deposition Exhibit Number Six was marked by the court reporter)

BY MS. SHECTER:

Q Where would I be able to find out if any of these candidates were on worker's compensation?

A We have a log kept at the office. I'm not sure if it goes that far back to 1986.

Q What kind of log is this that you're describing?

A It's a log where we log in when a person files for a workmen compensation case.

Q And how long is that log kept?

A I believe three years.

Q So that the only way to determine if somebody's on worker's disability compensation is through that log? I'm just talking about the candidates for these positions, that's all.

A Yes.

Q And it's not part of, for example, their personnel file or any of the materials that you'd be looking at?

A No.

Q When I say "materials looking at," materials that you're looking at to consider them for a promotion.

A No.

Q Our last packet, what is this?

A Now, this is promotion packages. weren't sure if you wanted these or not. This is for managerial positions for

revenue agent, Grade 13.

Q And let's just make sure that the rubber band contains what you have.

A Okay.

Q Date 5-6-86, certificate number 86-56?

A Uh-huh, correct.

MR. ZEBOT: Let me see if I've got that.

THE WITNESS: Oh, that's that one you were missing.

MR. ZEBOT: Let me -- bear with me one moment.

MS. SHECTER: Sure. This is the time to do it.

MR. ZEBOT: Where was that in Five] was it in part of Five?

THE WITNESS: That was in the

first rubber band; that should have been the last portion, after 88-20.

MR. ZEBOT: Right after this one? Yes, 88-20, okay.

THE WITNESS: Right.

BY MS. SHECTER:

Q What happens after that log, by the way, that you've just talked about, the worker's comp log after three years, what do you do with it?

A I believe it's destroyed.

Q At that point then, what record if any do you of a person having been on worker's disability compensation?

A I don't know.

Q Is it fair to say that you don't know if there is any other record of someone being on worker's disability

compensation?

A Yes.

Q Indeed, during the existence of that log, there may, he other records as well; is that correct?

A Well, each specialist -- we keep a folder on each case, also. So if it's not in the log -- it should be logged in, but we've had, you know, different clerical. So if it wasn't logged in, we still have a separate folder for each workmen comp case that's kept for three years.

Q What's in that folder; is it current proceedings of the worker's disability compensation case?

A Any forms that the employee has filed for on-the-job injury, and we

forward those to the Department of Labor.

Q Do you retain at IRS, if you know, -- if you don't know, tell me -- retain at the IRS any records of individuals who were on worker's disability compensation and returned to work?

A Could you repeat the question?

Q Sure. Do you keep at IRS any records which would indicate whether a person has been on worker's disability compensation and returned to work?

A Yes, in those folders.

Q There would be records within the person's personnel jacket as well, wouldn't there?

A I don't know.

Q What I'm asking is, how can I find

out if the persons who were considered for positions or who may have got positions were persons who were on worker's disability compensation either at the time they got the position or prior to it? If you don' know, indicate that you don't know.

A Yeah, I don't know.

Q You have no idea?

A I don't know.

Q Back to our exhibit. 8-28-86 is my second page, and I it's certificate number 86-113?

A Yes.

Q 11-26-86, certificate number 86-168?

A Yes.

Q Date 12-12-86, certificate number

86-187?

A Yes.

Q Date 1-9-87, certificate 87-03; date 8-11-87, certificate number 87-146; date 8-12-87, certificate number 87-152; then I have something that looks like management careers panel rating form, and it's for Barbara D. Greene, G-r-e-e-n-e?

A Okay. That all goes with certificate number 87-152.

Q And the next one is Susan Swanson, S-w-a-n-s-o-n. Does that go with it as well?

A Yes.

Q And then we go to 12-4-87, certificate number 87-224. And with that certificate, do we then have Hugh

Snowden, S-n-o-w-d-e-n?

A Yes.

Q Two packets of Hugh Snowden, one single page and one stapled?

A Uh-huh.

Q Ron Pattyn, P-a-t-t-y-n?

A Yes.

Q Sandra Battle, B-a-t-t-l-e?

A Yes.

Q Then I have roster of eliglibles for promotion or promotion certificate, date 8-16-88, certificate number 88-150-01?

A Yes.

Q And then going with that would be Bill Piner, P-i-n-e-r; Dave Petrillo, P-e-t-r-i-l-l-o; Larry T. Strang, S-t-r-a-n-g?

A It's Strong.

Q Strong?

A Uh-huh.

Q Okay. Kay Kronewritter, K-r-o-n-e-w-r-i-t-t-e-r?

A Yes.

Q Reanee, R-e-a-n-e-e K-a-l-v, as in Victor, i-n-s-k-i and Donelda, D-o-n-e-l-d-a, Zahline, Z-a-h-l-i-n-e?

A Yes.

Q That's it?

A Uh-huh.

MR. ZEBOT: Let me see that again, I'm sorry, one second. I think I missed one at the very beginning. I may have missed one or two.

(Whereupon Deposition Exhibit Number Seven was marked by the court

reporter)

BY MS. SHECTER:

Q We have marked that last package then as Deposition Exhibit Seven, and that represents all the documents that you have brought responsive to the request for documents; is that correct?

A Correct.

Q Let's go back to Deposition Exhibit One and see if I understand what you brought and if I have any questions about it.

Deposition Exhibit One refers to Internal Revenue agent, Series 512. What is this?

A This is the qualification handbook that we use to determine if an applicant is eligible for a revenue agent

position.

Q And that's the book that you said you looked at to be able to make a judgment of their qualifications?

A Correct.

Q Just glancing at it, it seems to refer to, for example, Handbook X-118 in one point. And is that a separate handbook, or is this the same handbook?

A No, that's -- okay.

Q I'm looking, for example, at basic requirements for all grades on page one. Go to line four underneath that. It says Handbook X-118, Accounting Series GS-5/10.

A Okay. We also use that handbook.

Q And did you produce that handbook?

A No.

Q Instead of asking you why not, tell me what that handbook is and what it means and all that other nice stuff so that I understand. Do you know about that other handbook?

A It's -- I know it and I refer to it, but I don't know how to explain it.

Q Do you, know why this was produced and not the other handbook?

A Because I was told this was just for Grade 13.

Q Okay. So the other handbook refers to what?

A It refers to Grade 5 and Grade 7.

Q And does this manual, this Deposition Exhibit One, refer to Grade 12 and above?

A Yes.

Q How high up does it go?

A It goes up to Grade 15.

Q And are all positions Grade 15 and above filled competitively?

A Unless it's a reassignment. If there's no chance for advancement, that's called a reassignment. But if it goes to a higher grade work, they have to compete.

Q When you say "no chance for advancement," what do you mean by that?

A If, say, a Grade 11 revenue agent applies for another Grade 11 position, they don't have to compete. We would just reassign them.

Q Now, what do you mean by "competition"? When you say "they compete," what does that mean?

A Competition is when an employee competes under our merit promotion -- in a merit promotion package for a higher level grade.

Q And what does that mean; what do you mean by "merit promotion package"? If you don't know, just indicate that.

A I know, but -- let me think. Do you want to know what the merit promotion program is?

Q Well, I asked you what you mean by "competition," and your answer was they compete in a merit promotion package. So I asked you what do you mean by that?

A Okay. Well, it's under the service-wide promotion plan, which all Internal Revenue Service employees have to compete.

Q When you say "service-wide," what do you mean by that?

A Internal Revenue Service.

Q So that means that someone working in the Detroit district is not restricted to a position in the Detroit district; they could go elsewhere?

A Correct.

Q And is there anything different about the methods or procedures of competition, for example, between Grade 12 and Grades 13, 14 and 15? The same procedures follows for all?

A Yes. Oh, except if it's a manager's position.

Q What is the management level?

A Grade 13 -- well, it varies from division to division. But then that's

handled by Stephanie under the management careers program.

Q This promotion program that you talked about does that involve promotion rosters in any way?

A Rosters for six months, you mean? It could, yes.

Q What is a promotion roster?

A A promotion roster is when a division anticipates filling a number of positions within a six-month period, we announce it as a roster rather than an ad hoc certificate.

Q What Is an ad hoc certificate?

A An ad hoc certificate is an announcement for one position -- I mean, not one position but -- yeah, one position, but they could have more than

one vacancy.

Q Explain that.

A For a revenue agent in Mt. Clemens, Grade 13, they anticipate three vacancies right now. So we would announce it and fill three vacancies but it's for, you know, one -- all in one vacancy announcement.

As opposed to a roster, we would announce it, and they would have six months to fill, you know. Say they have vacancies right now, and maybe in two months they're going to have 13 more vacancies, they can select off that same roster.

Q But that's good for only six months?

A Yes.

Q To whom do you send these promotion announcements?

A After they're announced? We post them on the bulletin board and all of our post of duties.

Q And to all of?

A Post of duties.

Q What's that?

A The Detroit district has different post of duties but with the personnel office in Detroit.

Q When you say "poster duty," what do you mean by that?

A It's the commuting area of the position. It's -- we have post of duties in Mt. Clemens, Kalamazoo --

Q Physically in some places?

A Yes.

Q What arrangement if any do you make within the announcements of promotion availabilities to persons who are out on a disability compensation?

A None, to my knowledge.

Q Did you have any involvement with Mr. Gavette in terms of Mr. Gavette's case or Mr. Gavette's situation in any way?

A I have his current workmen compensation claim.

Q But that's it?

A That's it.

Q And I take it during the period of time that he's been out on his current worker's compensation claim, you did not send him the announcements of any promotional availabilities?

A No.

Q For people who are out on worker's disability compensation do you or anyone else send those individuals statements of their rights concerning when they should apply for re-employment relating to their worker disability compensation?

A I don't know. I don't.

Q This section of Deposition Exhibit One ends at 512.26. Is that the complete section?

A Yes.

Q And this is -- I'm guessing as to why you gave me just Section 512. Is that because this is all for Grade Level 15?

A Grade 9 and above.

Q Grade 9 and above. Let's look at

Deposition Exhibit Two, and this refers to the collective bargaining?

A Correct.

Q How, if at all, does this differ from Deposition Exhibit One?

A This is the qualifications that we used to determine

Q "This" meaning Deposition Exhibit One?

A Is this what you're referring to, 512?

Q Yes, deposition Exhibit One?

A This is our guidelines to determine if an employee is eligible for the position.

Q Once you have the guidelines, then if it's a collective bargaining position, then you apply Depositior

Exhibit Two?

A Correct.

Q And so this would tell me the procedure that you used; is that correct?

A Correct.

Q There's something written in on what appears to be page 27, Section 8, miscellaneous. Is that your handwriting?

A Yes.

Q "If division knows the date of training for sure, put in date. Otherwise on certificate write in for effective date, asterisk"?

A Yes.

Q What is that all about?

A That was just a personal note. That

means that if a package is ranked, but the training -- say the package is ranked in March, but the training class doesn't start until July. For the effective date, we'd put in the July date rather than the following pay period.

Q The asterisk refers to something, and mine is obliterated.

A And so is mine.

MS. SHECTER: Does anyone have it?

MR. ZEBOT: You don't know what it is offhand?

MS. SHECTER: Do you know what it is offhand?

THE WITNESS: No.

MR. ZEBOT: We'll try to get that page.

THE WITNESS: Oh, wait. I have my book.

MR. ZEBOT: Do you have your book?

THE WITNESS: Yes. I should have deleted all that, I guess.

MS. SHECTER: I'm not going to hold it against you though.

THE WITNESS: Okay. Oh, I just put, "Promotion will be effective at the beginning of training." That's what I write in on the certificate for the effective date. If the division doesn't know for sure when the training class is going to begin I write that statement in there.

BY MS. SHECTER:

Q During your experience in the period of your responsibilities, has a

person who's been out on worker's disability compensation ever been promoted, to your knowledge?

A I'm not prepared to answer that.

Q You don't know one way or another?

A No.

Q But as to the people who you yourself have approved for promotion, do you know if any of those people have been on worker's disability compensation?

A I don't know offhand. I didn't research that.

Q Would you know how persons who are on worker's disability compensation become advised of promotional opportunities?

A No, I don't.

Q Okay. Let's look at Deposition Exhibit Three. This is a service-wide promotion plan. Now, this is again from the IRM, the Internal Revenue Manual

A Yes.

Q And what is this?

A This is our regulations that explain the service-wide promotion plan.

Q Now, how does this differ from Deposition Exhibit Two?

A This is the Internal Revenue Manual.

Q And the other is the collective bargaining?

A Is the contract.

Q But you told me that Deposition Exhibit Two would tell me, if I read it, the procedures that you follow. So what

does Deposition Exhibit Three do that Deposition Exhibit Two doesn't?

A This covers all positions, bargaining or non-bargaining.

Q Would Deposition Exhibit Three duplicate in any way for collective bargaining positions that which is laid out in Deposition Exhibit Two?

A It could.

Q When you say "it could"

A Well, for a bargaining -- there might be things in the contract for bargaining positions that differ from the Internal Revenue Manual.

Q But as to things which are for bargaining positions, it should be identical then to Deposition Exhibit Two; is that correct? If you don't know,

tell me.

A I don't know.

Q Once you determine that someone is qualified, what do you do?

A Once a person -- we determine if a person's qualified, we request a performance evaluation from their manager.

Q Would that be the most recent performance evaluation or a special performance evaluation for purposes of promotions?

A Their most recent, but it can't be over one year old from the date of preparation. And if it's over six months, it has to be revalidated by the manager and the employee.

Q So that there could very well be a

special performance evaluation made specifically for consideration for promotional purposes if the old one is more than six months old?

A Yes. Or if their duties have changed, another one could be prepared, too.

Q And the materials that you look at to determine the initial qualifications, are those materials which the applicant sends you in response to the posting

A Once we announce a position, the employees send us an interest card, a Form 4536, application for promotion reassignment. Then we pull their personnel folder and look at their other previous positions to determine if they're eligible.

And they also have to meet time and grade. So if they apply for a Grade 13 position, they must have served one year at the Grade 12 level.

Q And do you look at anything else in determining whether they're qualified?

A We look at all the information in their personnel folder. We look at college transcripts, their SF-171, application for employment, and all their government experience.

Q Once you determine that someone is qualified, then you get the latest appraisal?

A Yes.

Q And then what happens?

A Once the appraisals are in, then we set up ranking.

Q How do you do that?

A We receive a rank -- the name of a ranking official from the division, and we contact the manager and ask them when they can rank the package. And they come up and they review all the material.

Q Now, when you say "ranking," you yourself don't do the ranking?

A No.

Q That's, done by a ranking official from the division?

A Correct. It has to be a management official at the same grade level or above.

Q And what is the basis of the rankings; that is, whom are they, qualified, highly qualified, best

qualified or something like that, or do they get numbers?

A What they do is they compare the critical elements that the applicant is on now to the critical elements of the job they are applying for. And for each critical element, they have to write a narrative supporting their rating. Then they determine a highly qualified cutoff score, and the people who rank at the top are best qualified. And those are -- the applicants are referred to the selecting official.

Q How many applicants are considered to be best qualified; is there a number?

A There's four for the first vacancy and an additional name for every vacancy after that.

Q What if all four for one reason or another are rejected who are best qualified; do you then go down the roster?

A No. Then they just non-elect. If there's a tie score, we go down to the score breaks.

Q It's the point at which somebody else has the point rate which there is a next lower score even if the number is higher than four?

A Right.

Q You could have seven if there's a tie of four people?

A At four, right.

Q When you say you "non-select," does that mean the position goes vacant?

A Yes. That's up to the selecting

official whether not they want to select one of those best qualified.

Q And if the selecting official decides not to select someone best qualified, do they go back to the roster, or is that again within the discretion of the selecting official, if you know?

A Well, a roster is different from an ad hoc vacancy. So if the manager non-selects on an ad hoc vacancy, they can re-announce it at a later date.

MR. ZEBOT: Let me just interject for one second.

MS. SHECTER: Isn't the term roster also used -- perhaps that's where you're picking it up, Lynn -- for a list of candidates --

MS. SHECTER: That's where I'm picking it up.

MR. ZEBOT -- for a particular vacancy as opposed to having a roster of people for any vacancies that occur over six months?

THE WITNESS: Are you talking -- she's not talking about a six-month roster?

MR. ZEBOT: No, no. She's talking about the roster sheets, right, which -- isn't a sheet called that, where you list

THE WITNESS: Right, so it would be all the names.

BY MS. SHECTER:

Q Define for me what you were just talking about. Are there two different

kinds of roster?

A Well, there's a six-month roster.

Q Which is what?

A Which is if they anticipate numerous vacancies within a six-month period, they can use the same certificate.

Q "Certificate" meaning what?

A This roster of eligibles, this is the certificate.

Q And that's what you've done, is decide who's eligible for the promotions; is that correct? No?

MR. ZEBOT: Wait, wait. I think you're still confused. Let's go off the record for a moment.

(Discussion held off the record

MS. SHECTER: Let's go back on the

record so maybe we can straighten this out.

BY MS. SHECTER:

Q As I understand it, there are different kinds of rosters; is that correct?

A There's a roster of eligibles for promotion.

Q Which means what?

A It's Just a list of eligible applicants.

Q And how is it determined that an applicant is eligible?

A By the staffing specialist.

Q Which is what you do?

A Right.

Q So when I asked you before, that's what you do when you look at the IRM

qualifications that we talked about earlier in Deposition Exhibit One. That's what you're doing when you're determining if they're eligible. And you Just gave me the different things that you looked at --

A Correct.

Q -- to determine their eligibility?

A Correct.

Q And that's one form of the roster. And then that roster is maintained for six months?

A Oh, no.

Q No?

MR. ZEBOT: You're confused. Let's go off the record again.

(Discussion held off record)

MS. SHECTER: Go back on the

record.

THE WITNESS: I'm quoting from page 24 of the NORD III agreement. Can I do that? Oh, I can't do that? Okay, I'm sorry.

MS. SHECTER: What's wrong with it?

MR. ROGERS: Can we go off the record a second?

(Discussion held off record)

THE WITNESS: Okay, this is a one-time roster.

BY MS. SHECTER:

Q "This" meaning -- what are you pointing to?

A This Form 4537, roster of eligibles for promotion.

Q For a particular position?

A Yes. It can be a one-time or a

six-month roster.

Q I understand that. Now, the next question I asked you was, when you were determining who was eligible to be put on that roster, are you the person who does that?

A Yes.

Q And so the steps that you testified about taking were to put people on those two particular rosters?

A Correct.

Q Now, how is it determined for a position which is -- strike that.

How, how is it determined for a six-month eligible roster who gets a particular position when it comes up?

A The same way as it is for a one-time.

Q Still in sequence, based on the scores?

A Based on the scores.

Q So then in the case of a six-month roster, the score may not be pursuant to or particularly applicable to a specific position then; is that correct?

A No. It would still be to a particular position.

Q If everyone on a six-month roster is scored and you're not looking for a particular position, then how are you scoring them?

A We announce it as a six-month roster for a particular position.

Q Oh, I see. So that it's a particular position, but there may not be such a specific position available

A Correct.

Q How are people who are out on worker's disability compensation notified of their EEO rights?

A I'm not prepared to answer that.

Q Do you know if they are?

A I don't know.

Q You certainty don't do that?

A No.

Q When is somebody detailed? I see a reference to that as an exception to the competitive procedures.

A If there's a vacancy and it takes us awhile to announce the position, they can detail a person to that position until the position is filled.

Q So it's somebody who fills it on a temporary basis?

A Yes.

Q And are details limited then to 120 days?

A Yes. After that they have to compete.

Q The person who occupied a position on a detail, is that person given some credit for the time that person was on detail within the position?

A They could be in the ranking procedure. That's up to the ranking official.

Q And pursuant to 0335.222(2), I see that a personnel action must be made as an exception to the competitive procedures of the plan if it's an action as taken as remedy -- I'm reading (a) -- if it's an action taken as a remedy for

failure to receive proper consideration in competitive promotion action; is that correct?

MR. ZEBOT: Excuse me, Lynn. I didn't get the reference.

THE WITNESS: I don't know either.

MS. SHECTER: Sure. 0335.222(2)(a), and I'll repeat the question for you.

MR. ZEBOT: Two, two, two; three two's?

MS. SHECTER: Three two's and then and then (a).

BY MS. SHECTER:

Q My question was then, pursuant to that provision which I've just cited, that a personnel action must be made as an exception to the competitive procedures if it's an action taken as a

remedy for failure to receive proper consideration in a competitive promotion action; is that correct?

A Yes.

Q Have you yourself ever been involved in anything like that?

A I can't recall.

Q Do you know how that's handled if it's a personnel action which must be made as an exception to the competitive procedures of the plan for an action taken, as a remedy for failure to receive proper consideration in a competitive promotion action?

A If it's a regulatory or procedural violation of the service-wide promotion plan, they would be given priority consideration.

Q What do you mean by "priority consideration"?

A That mans if they were omitted from the competitive promotion package, they would be submitted on certificate prior announcing that position for consideration if the selecting official wants to select him, if a grievance was filed. A grievance has to be filed.

Q So that would be only for collective bargaining positions?

A Yes.

Q And what if it's a non-collective bargaining position?

A I don't know.

Q I'm looking now at 0335.231, consideration of internal candidates. I'm looking at (1) the minimum area of

consider. What is that?

A That's the area of consideration that we put on the announcement. We put district-wide. All of our announcements are district-wide employees.

Q Is there any limitation of persons outside the district applying?

A No. Any Internal Revenue Service employee can apply?

Q So minimum area means that you don't want to limit it to people who are Just working in that particular physical facility; is that what you're talking about?

A That's the smallest area that we would consider.

Q Do you know when you limit applications to the district, if at all?

A We don't.

Q Do you know if anybody does?

A The Detroit --

MR. ZEBOT: What do you mean by "anybody"?

MS. SHECTER: That's a fair question.

BY MS. SHECTER:

Q Any other districts submit the applications to their district?

A I don't know.

Q Unfortunately, my copy -- I'm referring you to 0335.251(2). I don't know if your copy suffers from the same deficiency as mind in the lower right-hand corner.

It's blocked out.

A Okay. It should say, "must insure

that priority consideration"

MS. SHECTER: With everybody's permission, I'll write it into the exhibit so that we have it.

MR. ZEBOT: Yes.

THE WITNESS: Line four --

BY MS. SHECTER:

Q Let me go on. "And carried out by personnel"? Do you see where it starts?

A "Personnel," correct.

Q Okay. "Personnel must insure that priority" --

A "Consideration", c-o-n-s-i-d-e-r-a hyphen.

Q -- "is properly applied in accordance" --

A "With", just "with," and then "regulations in IRM procedures."

Q How do you remember that?

A I don't know.

Q I'm am looking again under 0335.252 and I don't see any requirement there that a grievance be filed. Can you help me, show me where that is? It's not in that particular --

A I don't see it.

Q Okay. There are some other pages which appear to have crinkled up and hidden some of the bottom, but I think I can make out most of them.

A The only thing I can find saying they have to grieve it is in the contract. It states "grieve it proper consideration."

Q It states what? I'm sorry.

A It states that the applicant must

be a grievant.

Q May I see what you're reading from? This is NORD III national agreement between the Internal Revenue Service and the National Treasury Employees Union, document 6647, revised 7/89.

Q Do you know if the provision you were reading from was in effect prior to July of 1909?

A I don't know if it would have stated grievant in the prior contracts.

Q In Section 10, priorities consideration, is what you wore reading from?

A Yes.

Q And so that we don't have to make this an exhibit, I'll just read it into the record.

A Section A, first paragraph.

Q "If it is determined, through the grievance procedure, that violations of the provisions of this article resulted in denying the grievant(s) proper consideration, corrective action will be taken as follows: (1) Employees erroneously omitted from a best qualified list will receive priority consideration in accordance with the FPM; (2) Employees on the best qualified list who do not receive a fair and objective rating from the ranking panel, ranking official or immediate supervisor shall be entitled to priority consideration, if their rank order on the best qualified list is improved (3) Employees who were erroneously omitted

from, or improperly ranked on a roster announcement, but who do not otherwise qualify for relief under Subsection A(1) or (2) above, will be ranked in proper order on such a roster; and (4) Other violations will be remedied as appropriate."

That's what you were reading from?

A Yes.

Q Does this NORD III national agreement contain anywhere a provision that says if the individual does not grieve, that individual will not be considered for priority consideration?

A I don't know.

Q Okay. Let's look now since I think I can figure out the rest of the pages where -- does this have very thin pages?

Is that why it kind of crinkles up on the bottom?

A We've been having trouble with our Xerox machine.

Q I think I can figure out the rest of the bottoms, so let's look at Deposition Exhibit Number Four. Now, will you explain to me what this is?

A This a person's position description, which outlines their duties and responsibilities for that position.

Q And for what period of time does that position, Exhibit Four, cover?

A It covers --

Q It says 1982 on this first one, but I --

A Well, it covers all the vacancies filled during 1986 through July of 1988.

These are the position descriptions for these packages of vacancies. The date you were referring to was the date it was written.

Q I see. How do I tell when the position then was posted?

A The date was posted -- oh, by the announcement. It wouldn't be on this. It would not be on the position descriptions at all. It's on -- some of these we didn't have the announcements for. Let me pull one of those.

Q How long do you keep these position announcements?

A We keep them with the package. But Just for the ones that we didn't have the announcement inside the package for some reason, I put a note on here, "No

announcement available for this package." See, they're pulled a lot of times and Xeroxed a lot of times.

Q How long do you keep the packages?

A Three years.

Q And what happens at the end of three years?

A At the end of three years we send them downstairs and they're stored for additional years. I don't know how long, and then they're destroyed. So we have no records for 1985.

Q Because they're downstairs stored goodness knows where?

A No, because they're destroyed.

Q But you said you didn't know how long they were kept downstairs?

A Okay, hold on. Okay; I'm sorry.

They're destroyed after two years, after the personnel action --

Q You're reading from what, please? That's from the --

A Guideline I received from my Facilities management branch.

Q And that's the cover sheet that you provided to me, page two?

A Yes.

MR. ZEBOT: Yes, page two.

BY MS. SHECTER:

Q So if a position was filled in '86, then the package would be destroyed in '88?

A We've kept some, but I'm not sure why. I mean, we have some on file because I think our guidelines is to keep them for three years, something to

do with EEO, I believe. And then we send them downstairs, and I don't know how long they keep them down there. You were asking me when was the position announced?

Q Yes. How can I tell when the position was announced?

A It's on the vacancy announcement, the issue date.

Q And how do I tell when the position is filled?

A When the position is filled, the selecting official indicates on Form 4537 the name of the person they have selected and selection date.

Q Now, what's in this package that you're referring to? What is supposed to be in there?

A For the position descriptions? We have different type of revenue agents, and we have some in specialty groups. One is an Internal Revenue agent special enforcement. Another one is a CEPT member. So they all have different duties than a regular field agent.

Q And so your package contains?

A Our merit promotion package would contain the roster of eligibles, a Form 4536, which is the interest card, a job element appraisal, the most current job element appraisal, a letter to the employee advising them that we are using this job element appraisal, minutes of the ranking official, and a copy of the critical elements that were used in the ranking.

Q Deposition Exhibit Four then contains all that material for vacancies filled from '86 to '88?

A Right. That's the promotion packages for a Grade 13?

Q Correct.

MR. ZEBOT: Through July '88; isn't that correct?

THE WITNESS: Yes.

BY MS. SHECTER:

Q Okay. I understand what you're saying.

Deposition Exhibit Five now, this is the roster of eligibles for promotion and promotion certificates. And these are the people who were considered eligible for specific positions?

A Who have applied and were

considered eligible, correct,

Q Some have asterisks, some haven't on this first page why is that?

A If they have an asterisk before their name, that means they're highly qualified.

Q And who placed that asterisk there?

A Personnel.

Q Did you?

A Yes, based on their ranking.

Q That somebody provided to you?

A Yes.

Q Now, how do -- strike that.

Looking at part two, promotion certificate, which is the second page of the certificate number, whatever that is, 86-58, you said?

A Yes.

Q You have four names listed as highly qualified?

A Those would be best qualified.

Q These are the people who are best qualified?

A Uh-huh. Those are the ones who ranked at the top after the ranking procedure.

Q I see. So everyone with an asterisk is highly qualified and best qualified is the ranking above highly qualified?

A Yes.

Q So these are your highest people as determined by the ranking official?

A Yes.

Q Now, where in this package do I learn who received the position?

A Down on the bottom of Form 4537, it states, "I have selected the following named person, James Beumel."

Q And that will tell me the selection date and the effective date of the position; is that correct?

A Correct.

Q Now, under organizational designation, I see, for example, on the first there's a reference to Indianapolis or what I suppose is Indianapolis because the "s" is off, and then Salisbury, Maryland. Are these people from outside the district who applied?

A Yes.

Q Do people appear on one or more rosters of eligibles?

A They could if they had a continuous consideration and in or they filed an interest card for that particular vacancy.

Q Because I see, for example, 86-58 and 87-11, that those two names are identical.

A Oh, that's possible.

Q And 87-12.

A Uh-huh. In fact, for the Grade 13 vacancies, most of the Grade 12's would apply if they want that post of duty.

Q And why is that?

A Because it's a promotion.

Q Although the form may look different, I think in some of the more recent ones it looks like it was generated by computer, it's still the

same form, the same procedure was followed?

A Yes.

Q Okay Let's look at Deposition Exhibit Six. Now, as I recall, Deposition Exhibit Six is really a continuation of Exhibit Five; it was just that the rubber band was not large enough to accomplish encompassing all of them?

A Correct.

Q Now, these packets in Deposition Exhibit Five and Six do not contain, for example, all that was in the personnel jacket and in the personnel folder that you looked at; is that correct?

A Correct.

Q Why were these particular items

selected which are included in Deposition Exhibits Five and Six?

A The Form 4536, the interest card, and their evaluation is mandatory for a person to compete in a merit promotion package, and also we have to consider the awards for their last three years.

Q But why don't you put anything else in the package? For example, what -- strike that.

Why don't you put anything else in the package?

A From their personnel folder?

Q Yes.

A We would have no room to store them. They are promotion packages.

Q So, for example, if an employees

says, "I want to put something in so that the ranking official or whoever's going to make a decision will look at it," does the employee have the right to have that considered?

A Yes, they can indicate it on their interest card, which that's what they're supposed to do. Or some employees have attached a sheet of paper to their interest card.

Q So unless the employee Indicates otherwise, this package represents what you normally and ordinarily put into a package for consideration for promotion; is that correct?

A Correct. But the ranking official can also review the official personnel folders.

Q Are there any such packages or procedures followed when somebody asks for a reinstatement or re-employment from worker's compensation?

A I'm not prepared to answer that.

Q Because you don't do it and you don't know that?

A I work with workmen compensation claims, but I haven't reviewed what you just asked.

Q We]], how does someone go about saying "Hi I'm recovered, I want to go back to work" How does that happen?

A I'm not prepared to answer that.

Q And why is that?

A I haven' reviewed the regulations.

Q Do you normally take care of that procedure? Is that part of your normal

and customary duty?

A I'm trying to think if I've ever had a case where that's happened.

Q Take Your time.

A Could you repeat the question?

(Whereupon the last Question was played back by the court reporter)

MS. SHECTER: Okay, you can answer

THE WITNESS: Oh, okay. There's no merit promotion packages because that person isn't applying for a promotion.

BY MS. SHECTER:

Q No. My question is, how does a person go about, or how do you go -- strike that.

Do you have anything to do with the reinstatement or re-employment procedures when a person is returning

from worker's disability compensation?

A I'd have to say no.

Q Do you know who does?

A If they're returning to duty, the division has to submit an SF-52 request for personnel action.

Q When you say "the division" has to do that, how does the is division go about doing that?

A Well, the employee would notify his manager that he's returning to work, and then the division submits the SF-52 notifying personnel that the employee is returning to work so that we could -- if he's on leave without pay and not getting paid, that would notify us to, you know, put him back on the time and leave records.

Q What if the person that was returning from worker's compensation -- it sounds, when you say the employee notifies the manager he's returning to work, that that's all that's required for the person to become reinstated; is that correct?

A I don't know.

Q So you don't know really how the reinstatement works?

A No.

Q Deposition Exhibit Seven, the first part is similar to that which we've been looking at for certificate 86-56. When you say, "Note MCP files for 1986 for Averebuch and Shirley Ray," MCP is what?

A Management careers program class.

Q Do you know why that's true?

A No, I don't.

Q Or, again, on page two of the deposition exhibit, M-a-t-u-r-e-n?

A No. I don't know why.

Q Or Larry Griffiths?

A No.

Q And, again, for the management career panel procedure that's followed, is it the same procedure that you've described for persons who were not at management level?

A It's handled a little bit differently.

Q How is that?

A Can I have a minute to review my notes?

Q Absolutely.

A This isn't really my program.

They still determine highly qualified and best qualified.

Q Who is "they"?

A The management careers board, which is a body of high-level officials, and they're responsible for monitoring the management careers program. And I'm not sure how the rest of it's handled.

Q You were reading from what?

A The are just notes on the management careers program.

Q May I see that?

A Uh- huh. See, it has differed over the years, so it's hard to explain it.

MS. SHECTER: Can we just mark these notes then as Deposition Exhibit Eight? Do you have any objection?

MR. ZEBOT: Just off the record.

(Discussion held off record)

MS. SHECTER: Well, I'll make a copy of it.

MR. ZEBOT: Yes. Could you make a copy for me as well?

MS. SHECTER: Sure. Well mark this Deposition Exhibit Eight.

(Whereupon Deposition Exhibit Number Eight was marked by the court reporter)

BY MS. SHECTER:

Q One of the factors that look at, if someone is qualified, is their time within their position?

A Yes, time and grade.

Q Is there a minimum time and grade that a person has have before they --

A They have to have one year time and

grade if it's a one-grade-interval position. If it's a two-grade-interval position, they either have to have one year in the next lower grade or two years in the second lower grade. For instance, a revenue officer -- I'm trying to think of an example.

Q Sure, take your time.

A For a revenue agent, Grade 12, applying for a Grade 13, they have to have one year time and grade, if they're a revenue agent, Grade applying for a Grade 11, --

Q Two years in a Grade 9?

A -- one year because there is no intervening grade.

Q Because there's no Grade 10?

A Right.

Q But if you were applying for a Grade 13 from Grade 11, would you need two years of Grade 11?

A You would need one year at the Grade 12 if that position had that grade.

Q Is time -- strike that.

How is time spent on worker's disability compensation credited for purposes of time and grade?

A I don't know. If they're still -- can I retract that?

Q Absolutely.

A If they're still on our rolls, we would still consider them having the time and grade.

Q And what do you mean by "on your rolls"?

A Like an employee who's a seasonal employee, we have seasonal taxpayer service reps, they have to serve 2,080 hours because they don't work a whole year. You know they work part of the year and then they're off part of the year. Does that explain it?

Q No. My question is about worker's disability compensation. What do you mean when you say "if they're still

(Note: Obliterated by copy marks)

A I'm not sure. I'm not sure how to answer that.

Q Well let me try it this way. For how long is a person on worker's disability compensation kept on your rolls

A I'm not prepared to answer that.

Q Because this isn't your program?

A Because I don't know. No, I just don't know the answer.

Q Isn't this your program, the worker's disability?

A It's my program, but I haven't really had too many cases dealing with a person being on an extended leave without pay for a workmen comp case. Most of mine have dealt with traumatic injuries where the employee gets injured, they go to the doctor, they're off two weeks, and they come back to work.

So I would have to research the federal compensation guidelines in order to answer your question properly.

Q Where are those fed comp guidelines

kept then?

A They're in the Internal Revenue Manual, Chapter 810.

MS. SHECTER: Let's take a few minutes.

(Pause in proceedings at 2:30 p.m.)

(Proceedings resumed at 2:45 p.m.; all parties present)

BY MS. SHECTER:

Q you had no contact with Mr. Gavette during the time of his two previous worker's compensation?

A No.

Q So you don't know what notifications if any he received while he was out on worker's compensation; Is that correct?

A Correct

Q The union contract that we looked at, that was the most recent one, May of 1989?

A yes.

Q You don't know what changes if any occurred from previous years?

A Not without comparing the two.

Q And we don't have them with us today?

A No.

Q How often is that union contract renegotiated?

A I'm not sure. I believe it was two years. I believe the last one was '87, Is that -- it's yearly. Wait, it's every year.

Q Do you know?

A It's every year, isn't it?

MS. SHECTER: It varies?

MR. ROGERS: It varies from contract to contract.

MS. SHECTER: Depending on when you get an agreement?

MR. ROGERS: Sometimes they're extended, sometimes they're not.

BY MS. SHECTER:

Q The IRM manual that we looked at covered promotions to GS-15 . Would that include GS-15, or is that only up to GS-14?

A It covered GS-9 and above.

Q Nine and above?

A Uh-huh.

Q Is there a requirement that if one works, for example, at GS-12 and more than 25 percent of your work is at a

GS-13 level that you receive a promotion to the GS-13 level at least on a temporary basis, if you know?

A I don't know.

Q When you re looking at people's qualifications for promotion, does that come into play at all?

A Oh, yes. We consider it when they apply for a position. We count that time they spent as a Grade 13 if it's officially document" in their personnel folder.

Q What about the first question I asked then? You don't know whether, for example, if you worked -- more than 25 percent of your work is at a GS-13 level, if you should receive a temporary promotion to that GS-13 level?

MR. ZEBOT: I have an objection just as far as clarification. When you say "at a GS-13 level," you're not saying officially the GS-13 position.

MS. SHECTER: No.

MR. ZEBOT: But just what somebody believes would be work that a GS-13 might do; is that it?

MS. SHECTER: Yes.

THE WITNESS: Do they have to be temporary promoted to the Grade 13; is that your question?

MS. SHECTER: Yes, on a temporary -- even on temporary basis.

THE WITNESS: No.

BY MS. SHECTER:

Q They do not?

A They do not.

Q There is no such requirement?

A No, because it could be considered a detail to a higher graded work, and they could be detailed to that position.

Q Then that would be called detailed to that position, wouldn't it?

A Right.

Q Is there a difference between being detailed to a position and being on a temporary promotion?

A Well, a temporary promotion, you would receive the salary of the higher grade.

Q And a detail you don't?

MR. ZEBOT: If you're not sure, please indicate.

THE WITNESS: I'm not sure. I'd have to look that up.

BY MS. SHECTER:

Q These announcements for positions, do you send them outside the district as well?

A No. We send them to the other post of duties, you know.

Q Within your district?

A Yes.

Q But you don't send them outside your district?

A We send them to -- we do send some to regional inspection and to our appeals office.

Q What's regional inspection?

A It's our regional inspection office under the central region, but they're in Detroit, in our Detroit office.

Q Then how do you let people outside

the district know that there are positions available?

A They have to come down and look at our bulletin boards or call office of personnel management and they have a listing of all the positions.

Q When an individual goes out now on worker's disability compensation, at that point when they're leaving for it, do you give them any indication of what their rights are or what their rights would be on returning to work?

A I don't. I don't know if somebody else in personnel does.

Q That's your program though, isn't it? So the people in your program, you don't?

A See, I haven't had.

Q Well you said you've had these traumatic injuries. You testified to that.

A Okay. So...

Q So if someone goes out whose folder you have on a traumatic injury, do you yourself ever give them any indication of what their rights would be?

A Oh, sure. I tell them what forms I need.

Q That's for the worker's comp?

A Right.

Q What else do you tell them?

A I inform them what type of leave they're entitled to.

Q Which is?

A Which is -- if it's a traumatic injury, they're entitled to a FECA

leave, which is 45 days of pay.

Q What else do you tell them?

A Mainly what forms they need to submit to personnel.

Q For what purpose?

A To submit to the Department of Labor for the approval of their claim.

Q Anything else?

A We advise the employee information from them.

Q About their comp claim?

A Uh-huh, or If the forms they have submitted are incomplete or not completed properly.

Q Anything else?

A Not that I can recall.

MS. SHECTER: Thank you. I have no further questions.

MR. ZEBOT: I have no Questions.

(Whereupon, the deposition was concluded at about 2:55 p.m.)

STATE OF MICHIGAN)

COUNTY OF WAYNE)

I certify that this transcript, consisting of 72 pages, is a complete, true, and correct record of the testimony of Sharon Hays, taken in this case on Wednesday, March 7, 1990.

I also certify that prior to taking this deposition, Sharon Hays was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or

financially interested in the action.

March 14, 1990

Marcia M. Muonio,
CSMR-4084
P.O. Box 52522
Livonia, Michigan 48152

My Commission expires: August 11, 1992

EXHIBIT I

This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES E. GAVETTE, Petitioner, v. OFFICE OF PERSONNEL MANAGEMENT, DEPARTMENT OF TREASURY, Respondents.	) Appeal) No.) 84-) 1286) MSPB) Docket) No.) CH831L) 8210432) Mar. 28) 1984

DECIDED: February 1, 1985

Before MARKEY, Chief Judge, RICH, Circuit Judge, and COWEN, Senior Circuit Judge.

COWEN, Senior Circuit Judge.

DECISION

The final decision of the Merit Systems Protection Board (MSPB or Board), which upheld petitioner's involuntary disability retirement from

his position in the Internal Revenue Service (IRS) is reversed and the case is remanded.

OPINION

I.

In April 1979, petitioner, a GS-12 revenue agent in the IRS, successfully, applied to be placed on the promotion roster for GS-13 positions. Throughout the 18 years he had worked for the agency, be had consistently received performance ratings of satisfactory or better. Dissatisfied at his placement at the bottom the promotion roster, on June 6, 1979, he filed a grievance, through his union steward. He claimed that his group manager (supervisor) had not evaluated his work fairly and requested

a revaluation.

After this grievance was filed, tensions between petitioner and his group manager rose sharply. Between June 14 (when an employees' meeting took place in which petitioner publicly aired his grievance) and July 13, the supervisor drafted six memoranda critical of petitioner's job performance. On June 20, petitioner filed a second grievance, complaining that the critical memoranda were harassment and intimidation in retaliation for his first grievance. Between July 23 and July 30, 1979, the supervisor drafted seven more memoranda; highly critical of petitioner's performance. These negative memoranda

contrasted markedly to the supervisor's comments on petitioner's performance in a workload review dated June 5, 1979 (the day before petitioner filed his first grievance), which stated, "keep up the fine Job Charlie."

During (the 2-month period following the filing of his first grievance, petitioner began to suffer increasingly from an emotional disturbance, which he had had since 1976.

The agency then determined, on August 28, 1979, that petitioner should undergo a psychological fitness-for-duty examination. Petitioner consulted a board-certified psychiatrist, Dr. Warren W. Goodwin, in October and November

1979. Dr. Goodwin's report showed a diagnosis of "acute anxiety reaction super-imposed upon an obsessive-compulsive personality pattern with mild to moderate defensive paranoia." The report stated, however, that petitioner "has many good qualities which proper management could develop into very productive results from him. Dr. Goodwin recommended that petitioner be "transferred out of the whole area of employment conflict," and stated that the new supervisor should be skilled at working with his strengths and weaknesses.

The agency sought clarification of Dr. Goodwin 'a report in a letter which stated that two of petitioner's previous

group managers "had identified deficiencies in his performance." The letter also stated that the only other manager at petitioner's post of duty was "relatively new to his position," and that it had "no reason to believe" that assignment to this manager would improve petitioner's performance. In response, Dr. Goodwin wrote a second letter to the IRS in January 1980, stating that because it was not possible for the agency to provide the minimum conditions he had recommended, petitioner must be considered unfit for duty.

On March 25, 1980, the agency notified petitioner that it intended to file an application with OPM for his disability retirement. Petitioner

opposed the application. and it was rejected by OPM in April 1981, on the ground that the IRS failed to document either a deficiency in service caused by a medical condition or the incompatibility or petitioner's medical condition with useful service in his position.

On June 22, 1981, the IRS filed a request for reconsideration of the OPM decision, in which it set forth six pages of contentions to the effect that petitioner's performance in 1979 demonstrated that his emotional problems rendered him unfit for service. The agency attached a number of memoranda written by petitioner' a group manager in support of the request. On

reconsideration, OPM granted the request for disability retirement in February 1982.

In June 1981, petitioner requested that the IRS furnish him copies of that agency's request for reconsideration and attached documents. The agency refused to provide its request for reconsideration, citing provision of the freedom of Information Act and Privacy Act applicable to interagency memoranda and document prepared in anticipation of litigation. It was not until March 1982, after OPM granted the application for disability retirement, that the IRS reversed its earlier decision and furnished petitioner with the documents he had requested.

Petitioner timely appealed the OPM decision to the MSPB. The presiding official found that a preponderance of the evidence supported the agency's contention that petitioner's psychological problems rendered him totally unfit for Government service, and that the agency's decision did not involve harmful procedural error.

II.

5 U.S.C. 1701(c)(2) (1980) provides that agency decisions may not be sustained if the employee shows harmful error in the application of the agency's procedures in arriving at such decision.

Harmful error is defined in 5 C.F.R. 1201.56(c)(3)(1983) as:

Error by the agency in the application of its procedures which, in the absence or cure of the error might have caused the agency to reach a conclusion different than the one reached. The burden is upon the Appellant to show that based upon the record as a whole the error was harmful and has caused substantial harm for prejudice to his/her rights.

The seminal decision of the MSPB on the section 7701 "harmful error" standard, Parker v. Defense Logistics Agency, 1 MSPB 489, 493 (1980), elaborated as follows on this standard:

Unless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial [citations omitted]. Stated another way, the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error. See Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969).

Although this is a close and difficult case, we conclude that petitioner met his burden by showing that the agency's refusal to furnish him the material submitted in its request for reconsideration of the OPM decision was harmful error within the meaning of the applicable criteria. 5 C.F.R. 831.1203(b) (1983) requires agencies to notify employees in writing of their discrimination that disability retirement for such employees appears to be justified, along with the reason for this determination. Under 5 C.F.R. £ 831.1202(b), the required reasons and findings under section 831.1203(b) must be "specific and detailed." Similar requirements exist under FPM Supp.

831-1-S10-10, the section relied on in petitioner's request for the material the IRS submitted in its request for reconsideration.

The Government contends that the agency's March 25, 1980 notice to petitioner of its intended action satisfied the foregoing requirements. This notice informed petitioner that the basis for its intended action was the outcome of his psychiatric examination. The information contained in this notice was patently insufficient to constitute the basis for disability retirement, however, and was properly deemed as such by OPM. The element missing from the IRS's claim, which was purportedly supplied only in that agency's request

for reconsideration, was evidence that petitioner's job performance was deficient, and that such deficiency was caused by his medical condition. See 5 C.F.R. 831.1203(c)(1)(1980); FPM Supp. 831-1-S10-10.

The agency's refusal to provide petitioner with essential material when he requested it was a clear violation of the spirit, if not the letter, of 5 C.F.R. 831.1202(b) and 5 C.F.R. 1203(b). The fundamental precepts of due process underlying the notice requirements of these regulations would be undermined if agencies are permitted to withhold from their employees the dispositive reasons for seeking involuntary disability retirement.

The harmfulness of the Government's procedural error is demonstrated by the facts of this case. The request for reconsideration by the IRS consisted largely of conclusory statements alleging that petitioner refused to accept direction or criticism from management. These statements were made for the first time by the IRS in its request for reconsideration, and were only inferentially supported, to the extent they were supported at all, by the memoranda of petitioner's supervisor. The IRS utilized its allegations that petitioner was uncooperative with management as support for its contention that the "area of employment conflict" referred to in Dr.

Goodwin's first report was in petitioner's relationship with management in general. Thus, the agency took the position, which it contended was supported by Dr. Goodwin's report, that petitioner was unfit to work under the direction of any supervisor.

However, after petitioner belatedly received the IRS request for reconsideration, he submitted an affidavit to the MSPB in which Dr. Goodwin stated that IRS misinterpreted his report. The "area of employment conflict" out of which he recommended that petitioner be transferred, the psychiatrist stated, was only between petitioner and his group manager. He added that the only reason for his

recommendation that petitioner was unfit for duty was that he had been told that transfer to another group manager was "out of the question," and that the agency was determined to retire petitioner, either through disability or adverse action. In addition, petitioner proffered evidence that he was rated "above accepted standards" in the area of cooperation with management and taxpayers by both his group manager and his previous supervisors.

Once the arguments used by IRS in its request for reconsideration became known to petitioner, be was able to provide substantial evidence to refute them before the MSPB. Even though his more informed arguments ultimately

proved unpersuasive in the de novo review by the Board, they were at least sufficient to make petitioner's case a close one, which might well have been decided differently by OPM.

Thus, we find ourselves faced with an error of the IRS which affected the central issues in this very close case, and that error was not mitigated prior to the OPM decision. This is all the harmful error standard of section 7701 requires.

III.

As an additional ground for our holding, we agree with petitioner that under the circumstances of this case, the failure of the IRS to certify that no positions were available in

petitioner's grade to which he could be reassigned constituted harmful procedural error.

Under 5 U.S.C. 8337(a) (Supp. V. 1981), applicable as of the time the agency requested reconsideration of the initial decision of OPM, an employee was to be considered "disabled" only if not qualified for reassignment, under OPM procedures, to an available position in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. The Government brushes aside this statute on the ground that it was not applicable as of the time of the original application for petitioner's disability retirement. Nevertheless,

the Government concedes that an OPM regulation applicable as of that time (5 C.F.R. § 831.1203(c)(2)) required the agency to certify that no such positions were available, and that the IRS failed to make such a certification in the appropriate place on the Civil Service Commission's Standard Form 2801. The Government argues that this error was harmless, however, because the Board's presiding officer found, based on Dr. Goodwin's reports, that transfer to another position was not feasible.

If the record clearly showed that transfer of petitioner to alternative positions was not feasible, the agency's failure to make a certification to this effect might well have been harmless.

the Government concedes that an OPM regulation applicable as of that time (5 C.F.R. § 831.1203(c)(2)) required the agency to certify that no such positions were available, and that the IRS failed to make such a certification in the appropriate place on the Civil Service Commission's Standard Form 2801. The Government argues that this error was harmless, however, because the Board's presiding officer found, based on Dr. Goodwin's reports, that transfer to another position was not feasible.

If the record clearly showed that transfer of petitioner to alternative positions was not feasible, the agency's failure to make a certification to this effect might well have been harmless.

But this was decidedly not the case. The 1982 affidavit of Dr. Goodwin, whose earlier reports forced the basis of the IRS's initial determination that petitioner was unfit for duty, stated:

> It was my firm opinion (in 1980] and it remains my opinion today that Mr. Gavette could have returned to work at the IRS and likely performed his duties in a very productive manner if the IRS had been willing to reassign him out of the area of employment conflict which redeveloped between him and his group manager.

Moreover the 1980 report of Dr. Goodwin, recommending that petitioner be considered for disability retirement, was in response to an earlier letter from the IRS stating that petitioner's two previous supervisors "had identified deficiencies in performance." However, at that time, Dr. Goodwin did not know

that the affidavits of these two supervisors show that they considered petitioner's performance to be satisfactory or better, in spite of certain deficiencies.

Elsewhere in its letter to Dr. Goodwin, the agency tacitly admitted that it was possible to reassign petitioner elsewhere in the agency, as it said: "The only other manager at Mr. Gavette's post of duty to whom he could be assigned is relatively new to his position * * *." Finally, the agency implied to Dr. Goodwin that petitioner's assignment to a new manager was impossible because its managers "do not receive training to equip them to deal with severe psychological problems." As

Dr. Goodwin emphasized in his later affidavit, however, petitioner, in his opinion, did not have severe psychological problems. Thus, there are substantial indications in the record that transferring petitioner was feasible.

Given the state of the record, we can only speculate as to the reasons for the agency's omission. It is at least "within the range of appreciable probability," however, that the agency never formally determined whether it was feasible to transfer petitioner, and that if it had made such a good-faith determination, it would not have determined that petitioner could not be transferred. See Parker, 1 MSPS at 493.

The statement of IRS officers, noted in Dr. Goodwin's affidavit, that the agency wished either to retire petitioner for disability or remove him by adverse action, adds weight to the possibility that the agency did not seriously consider whether a transfer was feasible.

The House Budget Committee, in recommending the passage of 5 U.S.C. 8337(a), noted:

> If [a disabled] employee is able to perform useful and efficient service in another position and a vacancy exists, the employee must be reassigned rather than retired.

H.R. Rep. No. 1167, 96th Cong., 2d Sess. 206 (1980) [Emphasis added].

In light of this clear statement of Congressional intent and the distinct possibility in petitioner's case that a

transfer was feasible, we hold that the agency's failure to certify that transfer was impossible was harmful procedural error.

III.

In his appeal to this court, petitioner sought reinstatement to his former position. However, at oral argument his counsel stated that petitioner has abandoned his claim for reinstatement and desires to retain his status as an employee retired for disability. However, he renewed petitioner's request for an award of back pay, and for reasonable attorney's fees. Accordingly, this case is remanded to the Board with instructions that petitioner be awarded the

difference between the salary he would have received had he remained on active duty and the disability retirement pay he has received to the date of judgment, and any other relief to which he is entitled in accordance with this opinion, less any earnings he has received from other employment in the interval. Petitioner's right to recover attorney's fees is a question which is not before us and we intimate no opinion on his entitlement to such fees.